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Supreme Court, U.S.
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No._____

In the Supreme Court of the United States

JOHN J. CONNOLLY, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDWARD J. LONERGAN
Counsel of Record
101 MERRIMAC STREET
BOSTON, MA 02114
(617) 371-0430

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QUESTIONS PRESENTED

The questions presented are:

1. Whether supervisory powers are to be invoked when a court of appeals sanctions, adopts and advances the substantial and continued departure by a district court from accepted and usual courses of judicial proceedings in a manner which evidences a patent prejudice and bias in explicit violation of a criminal defendant's constitutional rights and expectations.

2. Whether the intonation by a circuit court of a mantra of a 'deferential standard of review' is euphemistic sanctioning and embracing of impermissible bias and prejudice.

3. Whether the essential and salutary effects of separation of powers and public scrutiny is impermissibly undermined by a pattern of bias and prejudice throughout a circuit that constitutes the abdication of the critical judicial role in the criminal justice system as a counterweight to prosecutorial misconduct in the executive department.

4. Whether a continued, *de minimus* and intuitive level of scrutiny by a circuit court of appeals concerning a district court's disdain and prejudice impermissibly undermines respect for the law by making it appear that serious and invidious prosecutorial misconduct is being countenanced.

5. Whether it is permissible under the Fifth Amendment for a court of appeals reviewing a series

of summary dispositions to give an unfettered deference to a district court that has acted without expressing any reasoned development in support of conclusions that seriously impact a criminal defendant's rights and expectations.

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PETITION FOR WRIT OF CERTIORARI

John J. Connolly, Jr., a retired and highly decorated agent of the Federal Bureau of Investigation who remains incarcerated in solitary confinement in a county jail in the State of Florida, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit in this case.

In plain and continued contravention of the requirements of the Constitution of the United States, the First Circuit demonstrates by incontrovertible word and deed an obvious and impermissible bias and prejudice that has caused a continued countenance and embrace of a series of arbitrary, capricious and vindictive actions and failures to act by a justice of the United States District Court for the District of Massachusetts that have resulted in: 1.) Connolly's inability to properly challenge his federal convictions and excessive punishment; 2.) a perilous incarceration in solitary confinement in a Florida county jail awaiting a trial for a charge of murder on alleged acts for which he was acquitted by the jury in this case; and 3.) the judicial shielding from public scrutiny of serious and credible allegations of pervasive prosecutorial misconduct.

OPINION BELOW

The court of appeals' opinion, dated October 16, 2007 and reported at 101607 Fed 1 (1st Cir. 2007), upholds a summary denial without supporting findings or rescript by the district court of Connolly's motion for a new trial regarding prior

convictions for, *inter alia*, an alleged conspiracy with prominent members of organized crime in New England. App. 1a-26a. The opinion includes an intentionally inflammatory introductory *ad hominem* condemnation of Connolly. The court of appeals by unreported order dated November 14, 2007 (App. 27a) denied the timely filed Petition of John J. Connolly For Rehearing En Banc. App. 29a-43a.

Notwithstanding emotive and injudicious tone and content, the opinion is facially of traditional form in terms of completeness. However, the opinion suffers fatally when examined, as fairly it must be, in context with the history of the proceedings against Connolly in Massachusetts and in Florida.

The opinion begins with the revelatory condemnation of Connolly as a 'disgraced former agent'. This virtually unprecedented invective serves to make manifest the presence of a bias and prejudice that was sensed and predicted with certitude by Connolly in a series of pleadings which have been continually ignored. App. 29a, 45a, 59a, 66a, 71a and 86a.

Examination and contrast of the actions of the First Circuit will make transparent that the opinion is a revisionist effort to rationalize that to which it did not and could not reason. It is the recasting of a discredited prior decision, *United States v. Connolly*, 341 F. 3d 16 (1st Cir. 2003) ("*First Connolly*") that now confirms that Connolly has been Tantalus in a netherworld within the First Circuit. Each time he is able to produce, discover or grow the fruits of vindication, gales within the First Circuit are intensified to vaporize such fruits

through unassailable indifference and a continued and flexible weaving of facts through inference and intuition that have culminated in the opinion which vents a prevalent, infectious and dooming animus towards Connolly. ("*Second Connolly*"). This is wrong.

STATEMENT OF JURISDICTION

The court of appeals' judgment and opinion were entered on October 16, 2007 and its denial of a petition for rehearing en banc was entered on November 14, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that " [n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

STATEMENT OF THE CASE

Connolly was indicted and convicted in the district court for violations of certain federal statutes allegedly occurring within that district. That court had original subject matter jurisdiction under 28 U.S.C. §3231.

Pre-Trial Proceedings in District Court and The Related Litigation

The Petitioner was a highly decorated agent for the Federal Bureau of Investigation and publicly identified as an essential and leading investigator involved with the elimination of the New England branch of *La Cosa Nosa* in the 1980's. He was retired for ten (10) years when, on December 22, 1999, this nightmare began as he was indicted in a criminal proceeding in the United States District Court in Massachusetts for alleged racketeering ("RICO"), including a charge that he had illegally disclosed confidential law enforcement information to members of organized crime.

1.) **The Related Litigation**: The indictment was spawned by a celebrated prosecution of several prominent and notorious criminal figures who had survived the FBI's successful war on organized crime in New England. *United States v. Salemme*, et al., Cr. No. 94-10287-MLW-2 (D. Mass. January 10, 1995). This case was tried before the honorable Joseph Wolf and has come to be known colloquially and universally as the "*Wolf Case*". The lead prosecutor in the *Wolf Case* was Assistant United States Attorney Fred M. Wyshak, Jr. ("Wyshak").

The defendants in the *Wolf Case* included James "Whitey" Bulger and Steven "The Rifleman" Flemmi, each of whom were top echelon informants for the FBI handled by Connolly and, as alleged and proven in *First Connolly*, 'members of the Winter Hill Gang'. The don of the Boston office of *La Cosa Nostra*, Francis "Cadillac Frank" Salemme, was also a defendant. App. 2a-3a. Salemme had long ago been a fugitive from justice when he was arrested on

the streets of New York City by the then young FBI agent, John J. Connolly, Jr.; an arrest which resulted in Salemme serving 16 years in prison. App. 15a. Each of these defendants is admitted by all to have committed a series of brutal assaults and murders.

Flemmi and Salemmi have been arrested, prosecuted, incarcerated and handled by Wyshak and his team of investigators. Wyshak produced Salemme as the primary witness upon whose testimony the Connolly indictment was issued by a grand jury based upon allegations which included Connolly's alleged disclosure, five (5) years after his retirement, to these notorious criminals of secret or confidential law enforcement information that they were to be imminently indicted in the *Wolf Case* (the 'tip').

Although the First Circuit often alludes to the *Wolf Case* when seeking to support its condemnation of Connolly, and notwithstanding Connolly's continued objection, the First Circuit maintains a firewall between the two cases so as to create a procedural bifurcation that prevents Connolly from access to exculpatory materials and Wyshak.

2.) **The Superseding Indictment.** A superseding indictment was issued against Connolly on October 11, 2000. App. 3a. This indictment includes specific allegations of the details of the alleged 'tip' from Connolly to Bulger, Flemme and Salemme of the imminence of the indictments in the *Wolf Case*. The 'tip' allegedly occurred on December 23, 1994 (a critical date for the prosecution to satisfy the statute of limitations) and would be proven by the testimony of Kevin Weeks. Weeks was originally

denominated and celebrated by the First Circuit in *First Connolly* as 'the government's star witness' and 'Bulger's right hand man'. App. 52a-53a.

Notwithstanding that the alleged 'tip' of confidential information was supposedly transmitted through Weeks on December 23, 1994, it was almost two (2) weeks before Flemmi was arrested with virtually live or real time media coverage which alerted Bulger and Salemme to flee from Massachusetts. Although Salemme was eventually captured and ultimately became a witness against Connolly, Bulger has become legendary in his continued and elusive status as second only to Osama Bin Laden on the FBI's Most Wanted List.

Trial, Sentencing and First Appeal

1.) **The Trial.** In May of 2002, Connolly had a three (3) week jury trial on the following counts in the superseding indictment:

Count 1 for a RICO violation and conspiracy to violate RICO, alleging a pattern of racketeering activity with fourteen different racketeering acts of bribery, extortion and obstruction of justice, including the alleged 'tip' of December 23, 1994;

Count 4 for obstruction of justice alleging that Connolly had informed Flemmi of an indictment against him in the *Wolf Case*;

Count 6 for obstruction of justice alleging that the Petitioner had caused an anonymous letter to be delivered to Judge Wolf crediting certain claims being made by the defense in the *Wolf Case*;

Count 7 for obstruction of justice alleging that Petitioner persuaded Flemmi to testify falsely in the *Wolf Case*; and

Count 9 for obstruction of justice for making a false statement to an FBI agent during a 'courtesy call' made to the Petitioner five (5) years after his retirement and which statement is alleged to have consisted of responding 'no' to a question as to whether or not Petitioner had any contact with anybody on the defense team in the *Wolf Case*. (The allegations of Counts 6 and 7 were also enumerated as two of the fourteen different alleged racketeering acts charged in Count 1).

2.) **The Verdict.** On May 23, 2002 a jury returned guilty verdicts on Counts 1, 6, 7 and 9 and not guilty on Count 4. The jury also specifically acquitted on 9 of the 14 predicate acts because the same had **not** been proven beyond a reasonable doubt.

Those acts that were found to be proven beyond a reasonable doubt were limited to: 1.) being a conduit in 1982 or 1983 for the delivery to his then FBI superior, John Morris (an admitted and cooperating felon living on his government pension in Florida), of a bribe in the form of a case of fine wine and $1,000.00; 2.) 'tipping' Bulger of an imminent indictment; 3.) 'tipping" Flemmi and Salemme of an imminent indictment; 4.) writing an anonymous letter to Judge Wolf; and 5.) providing Flemmi with arcane nomenclature to enhance his testimony in the *Wolf Case*.

Connolly did not testify in the trial and did not, and does not tacitly now, admit to any of the facts upon which the guilty findings were made.

2.) **The Sentencing**. The base sentence for these convictions was three years. The probation department submitted --- and the district court accepted without analysis or comment and the

circuit court of appeals ultimately adopted and embroidered as true --- a series of acts for enhancement for which there had been acquittal by the jury because the same had **not** been proven beyond a reasonable doubt. Connolly's sentence was increased to one hundred and twenty-one (121) months[1].

3.) **The Appeal**. Connolly's convictions and excessive sentencing were upheld in *First Connolly* and clothed with a high degree of probity by a selective canvassing and enhancement of the record to weave a tale of inferences as to facts that the jury 'could have found' notwithstanding that the jury specifically found most enumerated facts as having **not** been proven beyond a reasonable doubt. It is this process of guilt through judicial induction and unproven and inferred facts that first revealed to Connolly a predisposition of the First Circuit that reflected an acceptance of the media generated image that Connolly is not truly worthy of or entitled to objective review.

First Connolly justifies its development and presentation of a supporting and negative persona by heralding Kevin Weeks as the 'government's star witness' and 'Bulger's right hand man'. This casual acceptance, adoption and trumpeting ultimately proved to be discomforting when it was revealed by

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[1] It is enraging to have the prosecution argue, as it shamelessly did, in opposition to the motion for a new trial that these unproven facts **are of no moment** and to have the First Circuit casually refer to new evidence as being 'at least arguably relevant, even though they (only) touch upon predicate acts of which (Connolly) was not ultimately convicted. (App. 20-21). These are the unproven acts for which Connolly remains in solitary confinement.

Connolly that Weeks' testimony was scripted and false. App. 52a-53a. . However, this was not cause to revisit for correction. The First Circuit chose instead and impermissibly to quietly shed its adulation of Weeks by a discreet demotion to 'aide de camp'. App. 11a. This is one of several subtle components of the revisionist work that is *Second Connolly*. Such a change may seem on first impression to be an innocuous and administrative edit. However, to Connolly, it is but one of several discordant notes that comprise a cacophony that reveals the predisposition of the First Circuit to make any statement that might be deemed necessary and convenient to mask a motivational disdain.

Post-Trial Motions, Petitions and Appeals

Connolly valiantly maintains his innocence and continues to pursue those avenues through which he might yet be vindicated. As will be shown, this typically daunting challenge has been seriously exacerbated by that series of acts and failures to act that Connolly asserts are manifest evidence of an impermissible bias and prejudice that have denied him effective access to those avenues.

1.) **Motion To Vacate**. Connolly filed a pro se motion to vacate sentence pursuant to 28 U.S.C. § 2255 ("Motion To Vacate") because of the several rulings of this Court regarding sentencing guidelines. Connolly, then acting through his *pro bono* counsel, moved jointly with the *de jure* prosecutors in this case that the Motion To Vacate be stayed until the disposition of a separate motion for a new trial that Connolly was to soon advance.

This motion was remitted by the district court to a magistrate and ordered stayed until further request of the parties.

2.) **Wyshak**. In a most unusual requirement, Connolly has battled endlessly to seek effective relief by having judicial recognition of Wyshak's role as the *de jure* prosecutor in this case. However, the continued procedural bifurcation of this case with the *Wolf Case* has allowed Wyshak to conduct a pursuit of Connolly with unlimited resources, questionable values, no judicial oversight and without regard or concern that actions which violate Connolly's constitutional rights will be judicially examined. The actions include recruiting, coercing and directing a string of vicious criminals to provide the testimony that set the tone to contaminate Connolly with the general public, the jury, the district court and the First Circuit.

The First Circuit turns a blind eye to the prominent----and highly publicized[2]---role of Wyshak in Connolly's prosecution. App. 91a. This intransigent posture remains impregnable to the growing evidence that the notorious witnesses upon whom the prosecution relied were coached and coerced by Wyshak.

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[2] Although the First Circuit cites a magazine in its weaving of its intuitive analysis, it neglects to note that Wyshak as Batman and his prosecution partner as Robin are featured as *The Avengers* in same magazine for their role in the 'completed' proceedings involving Bulger, Flemmi and Connolly (Boston magazine May, 2005). It is now obvious that the timing is such that this adulatory article, prepared with Wyshak, was being composd and published before Wyshak knew that his celebrity was to be endangered by a motion for a new trial by Connolly which would include the Salemme Report (as hereinafter described.) Hence, the Florida indictment as the tactic to effectively dismantle and disrupt Connolly's bid for vindication.

3.) **The Civil Cases**. There are several civil proceedings in the first circuit involving claims of families whose relatives were murdered by Bulger and Flemmi, which claims rest dramatically upon the adoption and acceptance as proven and true those facts woven through inference in *First Connolly* (e.g., in the matter presently pending in the district court entitled and numbered *The Estate of Edward v. United States, et al.*, 1:01 CV 11346, the honorable Reginald C. Lindsay noted on January 24, 2008, that he had "suggested a framework for settlement at the very first conference of the parties". Connolly through *pro bono* counsel participated in that first conference and had to notify the district court that the settlement as urged rested upon an incorrect premise that the facts in *First Connolly* were accepted as true. They were not. They are not.) These claims have resulted in substantial judgments against the federal government (the "Civil Cases").

The Civil Cases have proven to be a treasure trove for Connolly in that there are a growing number of instances in which the inferred facts of *First Connolly* are clearly and unequivocally disproved. In addition, the nature and extent of prosecutorial misconduct becomes clearer and more compelling.

4.) **The Salemme Report**. The effort to mine those nuggets that would have to be assembled to present a compelling argument for a new trial and to otherwise support Connolly's vindication were substantially augmented when the Federal Bureau of Investigation provided detailed information regarding a confidential informant who could and

would testify credibly, *inter alia*, that Salemme was coerced into testifying falsely against Connolly by the Wyshak prosecutorial team.

5.) **The Florida Indictment**. As soon as Connolly advised the prosecution that he would be filing a motion for a new trial, a motion which would incorporate the Salemme Report, he was indicted in Florida by Wyshak who, in a move that all must concur is most unusual, has had himself deputized as a Florida state prosecutor to pursue Connolly.

6.) **Salemme's Arrest**. Salemme, who had been freed as part of his testifying against Connolly, was also arrested by Wyshak for making a false statement to a federal official and placed in a jail in parts unknown. The false statement that Salemme made was identical to a sworn statement he made in Connolly's trial and was, ergo, perjury. However, he was not arrested, detained or charged with perjury -- a charge which would, of course, advance Connolly's motion for a new trial. Salemme remains in Wyshak's custody and unavailable for examination.

7.) **Perilous Rendition**. Upon Wyshak's obtaining of a state indictment in Florida, he moved for the immediate rendition of Connolly from the safety of a federal facility to the floor of the general lockup in the Miami-Dade jail.

8.) **Emergency Motion and Petition For Mandamus**. When notified of his proposed rendition to a place of proven peril (i.e., Paul Rico, another retired agent of the FBI also prosecuted by Wyshak, had been placed in the same jail, was seriously beaten and died within months thereafter), Connolly appealed to the district court for emergency review and intervention. He was literally ignored. Connolly

was then forced to seek relief by mandamus from the First Circuit. App. 71a. The prosecution reacted to the threat of mandamus by removing Connolly from the floor of a holding cell for 50 prisoners to the solitary confinement that continues to this day. App. 86a. The First Circuit denied the petition for mandamus. App. 94a.

9.) **Motion For New Trial**. Connolly filed a substantial and complex motion for a new trial which included incontrovertible evidence of prosecutorial misconduct relating to inducing perjury and scripting, concealing and fabricating evidence. This motion was accompanied by an extensive memorandum and exhibits that are too voluminous for reproduction at this stage. That material included the Salemme Report concerning Salemme's revelations to a confidential informant that the prosecution (i.e., Wyshak) had threatened Salemme that he would rot in prison if he did not cooperate.

The motion for a new trial presented materials that would show, *inter alia*: 1.) that the 'government's star witness', Kevin Weeks, was neither 'Bulger's right hand man' nor a member of the Winter Hill Gang; 2.) that the materials submitted to Connolly by Wyshak concerning a former Assistant United States Attorney Jeremiah O'Sullivan that seriously undermined Connolly's defense of authority in his handling of Bulger and Flemmi was 'replete with errors' (i.e., false and fabricated); and 3.) that there was coercion and scripting of witnesses and the suborning of perjury.

The Salemme Report was of obvious and extreme sensitivity because it was an accusation of serious prosecutorial misconduct. In this posture, it

was not to be vetted by the Wyshak prosecutors. The report was sent to AUSA Fitzpatrick, prosecutor of Scooter Libby, and determined to be reliable. The confidential informant was deemed credible and was, in fact, a witness that was used effectively by the government in a series of organized crime trials in Philadelphia. The confidential informant had no interest in Salemme or Connolly.

10.) **Summary Denial.** The motion was summarily denied by the district court without evidentiary hearing and without findings or rescript. That this was unusual, unexpected and insufficient was emphasized when the government sought an explication of the summary denial. The district court denied the government's request.

11.) **Peremptory Denial of Motion To Vacate.** The purge then continued when the district court simultaneously revoked its order of remittance of the Motion to Vacate to a magistrate; ignored its own outstanding order granting a joint motion for a stay of proceedings; and peremptorily and summarily denied that motion without an evidentiary hearing and without findings or rescript. Connolly's plea and plight were again dismissed with disdain by the district court.

12.) **The Appeal of the Motion To Vacate.** Connolly was now to return to the First Circuit where his prior direct appeal was denied through the intentional, and now known to be erroneous, weaving of inferred facts that would come to be accepted lore within the circuit and where his plea for review of serious and threatening prosecutorial acts was ignored with almost the same level of disdain as exhibited by the district court.

Connolly appealed the denial of the Motion To

Vacate and included in the various aspects of those proceedings his continued concern and fear regarding the aberrant behavior of the district court. This appeal was formulaically denied by the First Circuit without substantive reference to or comment upon his charges concerning the district court. If the matter at bar were not so serious, the interchange between the district court and the First Circuit concerning certificates of appealabilty would have been comical. App. 32a, 50a. However, since Connolly remains in isolation, he chillingly regards it as evidence that there are no opportunities for him to succeed in the First Circuit.

13.) **Petition For Hearing En Banc or Recusal.** Having been incarcerated in a county jail in Florida without any effective review by the district court or the First Circuit and recognizing the incarceration as being a tactic intended to divert attention from his motion for a new trial (App. 72a) , Connolly filed a petition for the First Circuit hear his appeal on the summary denial of this motion en banc or for a recusal of and by the First Circuit. Connolly specifically noted his contention that this case had become "a cornerstone of a myriad of high profile civil and criminal matters in which the prosecution has successfully been able to have **it accepted as a fact beyond critical review within (the first) circuit that (Connolly) is a former rogue agent of the Federal Bureau of Investigation.**" App. 47a. This petition included the recitation of a series of facts that objectively warrant an examination to determine the extent of prosecutorial misconduct, including the now obvious duping of the First Circuit through scripting that Kevin Weeks was a 'star witness' and 'Bulger's right hand man'. This

petition was denied without comment. App. 44a.

13. ***Second Connolly***. The First Circuit continues the pattern of disdain that precludes Connolly from obtaining an objective review of his claims for relief. It does so in a manner that reveals that Connolly's allegations of prejudice and bias are not amorphous, ephemeral or psychosomatic.

The First Circuit, with a lack of moderation and professionalism, begins it latest tale of inference with the *ad hominem* introduction of Connolly as "a disgraced former agent of the Federal Bureau of Investigation". A search of opinions reveals no such condemnation of any other defendant in such a hostile and denigrating manner---not murderers, pedophiles, traitors, arsonists, terrorists, etc. This is obviously not a statement presented by an objective panel. It is argumentative posturing being used to generate a predisposition for a reader to accept the reweaving that was to follow.

Connolly was unfortunately prescient in his fear of bias and prejudice. The First Circuit, as anticipated and predicted by Connolly in his petition for an en banc hearing or recusal, has summarily denied his appeal of the district court's action. It has done so by recasting *First Connolly* so as to again rebut or accept as inconsequential facts that undermine Connolly's convictions, excessive sentencing and the findings created by inference in *First Connolly*: a.) Bulger and Flemmi explicitly described by indictment and in *First Connolly* as 'members of the Winter Hill Gang' are now characterized as being 'nominally part of the Winter Hill Gang' (App. 3a); b.) Kevin Weeks, formerly trumpeted by the court as the star witness, is casually and discretely demoted to Bulger's aide de

camp (App. 11a); 3.) the investigation which is the subject matter of the related litigation, a secret Massachusetts State Police endeavor, is now referred to as being the "FBI's case against Bulger, Flemmi and their cohorts' (App. 3a); 4.) the 'confidential information' that Connolly allegedly 'tipped' on December 23, 1994, is now incredibly described as having become '(i)n short order ...public." (App. 3a); and 5.) perjury by Salemme is casually accepted as likely but of minor concern. App. 22 a.

The recasting of these facts is illustrative of the pattern of the First Circuit to rebuff any counterattack by Connolly without regard to truth, fairness or justice. That pattern is then continued by the repeated refusal of the First Circuit to examine the bases of the serious and credible allegations of prosecutorial misconduct and ignoring the predominant role of the Wyshak team in the indictment and prosecution of Connolly. It is the procedural bifurcation of the *Wolf Case* and this proceeding that allows the First Circuit to avoid the uncomfortable task of examining accusations of prosecutorial misconduct. This refusal includes the chanting, for example, of the reliability of a series of affidavits from the prosecution that supposedly confirm the fact that Salemme was not coerced into committing perjury. App. 16. However, a cursory review of the affidavits shows this fawning to be misplaced and deceptive because the purported informative affidavits are intentionally and patently circumscribed in a successful effort to prevent review of Wyshak's maneuverings. And it is also of significance that the statement of Salemme being in the company of his attorney when handled by the

prosecution is known in the circuit to be untrue. App. 38-39.

It is of unusual and particular alarm to note the First Circuit's approach to any review regarding Connolly. That the sententiousness of the opinion is truly emotional and not objective is made frighteningly clear when the First Circuit makes invocation of a standard of review that was thought to have been abandoned with the abolition of the Star Chamber in 1641—'intuition'. (App. 17). The First Circuit has literally and admittedly intuited the rationale it uses to support the district court.

We in Massachusetts, in response to the need to correct the evils of the spectral convictions in the infamous Salem Witch Trials, precluded the use of metaphysical evidence in 1703. Connolly has long argued that intuition --- the judicial equivalent of prejudgment or prejudice or bias --- has been the standard of review for him. The First Circuit now confirms what this Court should reverse and correct.

13.) **Petition For Rehearing en Banc.** Although Connolly's family must suffer again the public ignominy of a husband and father being the victim of a truculent First Circuit, the unprecedented invective verifies the presence of the impermissible bias and prejudice that requires this Court's intercession. Although *Second Connolly* is authored with a lexiphanic style that percolates with the pedant's predilection for or propensity to pretension, the prose is blunt, basic and functional in the opening salvo that attacks and characterizes Connolly in a patent and impermissible effort to make plausible its refusal to objectively review Connolly's plight. The filing of a request for a

rehearing which again declared Connolly's contentions as to serious and egregious judicial failings---and in this instance, including explicit references to the First Circuit's tacit and substantive redactions that recast and minimize essential facts---was received and summarily dispatched by the First Circuit in the only manner in which it remains unfailingly and unfortunately consistent. That is, of course, a disdain for Connolly.

REASONS FOR GRANTING THE WRIT

I. This Case Presents the Important Question With Serious And Negative National Implications, Including Chilling the Zeal of and Intimidating the Members of the Military, Intelligence and Law Enforcement Communities, As To Whether Palpable Bias And Prejudice Can Infect and Endure Within A Circuit and to Thereby Deny A Defendant Any Semblance of Constitutional Rights And Expectations.

Connolly was a prominent national figure who was regarded as a hero for his expertise and courage in developing top echelon informants and his pivotal and very dangerous role, acting with knowledge and direction of his superiors, in the decimation of *La Cosa Nostra* in New England. His subsequent arrest, prosecution and extended incarceration long after his retirement is truly chilling to any similarly situated officers in the military, law enforcement and intelligence communities. These communities must now act in realistic fear that they may one day be subject to

harsh and unpredictable penalties imposed by a judiciary that countenances the tyrannical acts of a new generation of prosecutors. Such prosecutions should only stand upon evidence which is compelling and relates to failings that are criminal and proven beyond a reasonable doubt. This standard has not been achieved in this case.

The review of the long and sad history for Connolly and his family and friends does not withstand scrutiny. The most serious charges against Connolly were specifically rejected by a jury. The extended trial presented an avalanche of charges through testimony from notorious criminal figures. Although Connolly's primary responsibility as an agent was to interact with vicious criminals, one the most notorious witnesses against Connolly was one he has never met: John Martarano, a vicious killer who admits to 20 murders, was rewarded for his testimony by release from prison and featured in January on national television on 60 Minutes. Nevertheless, the testimony creating the appearance of nefarious connections between Connolly and the members of organized crime was effective in so far as the jury rendered findings of guilt on the much less serious, but not insignificant, charges. This prosecutorial ploy is to our national misfortune widely accepted. It is not unfair to make a professional assessment that had Connolly been charged and tried solely on those matters that were accepted by the jury and untainted by the emotional and dramatic materials used by the prosecution to set tone and taint proceedings ---much of which is now known to be false and scripted and none of which was accepted by the jury---a different outcome is likely.

The actions and failures to act by the district court as sanctioned, embraced and enhanced by the First Circuit insulates Wyshak and his team from judicial scrutiny.

II. This Court Should Resolve the Important Question Of The Proper Level Of Scrutiny Required by the Fifth Amendment by an Appellate Court of District Court Actions To Deny Substantive Matters Without Articulating A Reasoned Support For Such Denial When Such Action Is A Part Of A Pattern That Has Been Timely, Continually And Credibly Challenged as Being Biased, Prejudiced. Aberrant, Arbitrary, Capricious and Vindictive

We as a society share an aspiration of absolute and perfect justice. We accept that this goal of perfection is not attainable in a system that is truly human. We proclaim ourselves a nation of laws, but the truth and vitality of this dynamic factor is directly correlated from time to time and from place to place with the integrity, ability and dedication of those humans endowed with the power to administer and enforce those laws. Although some of our failures are more pronounced than others (e.g., Dred Scott Decision or the imprisonment of our fellow citizens in World War II), none improve us as a nation and none should be casually accepted as a collateral loss in what some might perceive as a broader and more significant endeavor.

The goal of perfection is pursued in accord with an ancient and historic process through which

thoughtful judicial decisions are expected with articulation and substantive reasoning that engenders respect and confidence We do not knowingly lower our standards and expectations. We should not allow any district court or appellate court to act with an insularity that fatally infects the purity of our communal intent. The distance between our republic and a police state is maintained by a vigilant judiciary that insists that prosecutors act in substantial accord with our protective laws. That distance is not being maintained in the first circuit or by the First Circuit.

III. This Court Should Confirm That the Fifth Amendment Prohibits an Appellate Court When Reviewing a Series of Acts and Refusals to Act By a District Court To Reduce The Level of Scrutiny or Standard of Review To One of Absolute Deference

John J. Connolly, Jr. lies in isolation in a non-federal facility facing a murder charge being prosecuted by Wyshak. He has been convicted by evidence from cooperating and coerced felons that is now being shown to be in large measure false, scripted and fabricated. He is a victim of a process which denigrates our stated desire for justice by a willful trial justice and a collaborating or empathetic circuit court of appeals. The selective canvassing, characterizing and rewriting of the record to rationalize support for a district court is not applying a deferential standard to review a reasoned conclusion. It is rationalization to confirm a belief and to ignore, misstate and create facts so

as to confirm for personal and/or public consumption a predetermined and unreasoned conclusion.

We have seen historically that the benefit of time and successive review often leads to corrections of prior and serious judicial failings and to thereby reflect our better nature. The Petitioner seeks that review from this Court with confidence that the judicial system with which he was prominently and successfully associated for 25 years will serve to do justice.

It is true, of course, that findings of fact are seldom matters for review here, but lack of findings by the district court in the circumstances presented should be regarded as obvious, exceptional and fatally flawed failures to provide guidance to Connolly, the public and the appellate court as to its rationale. Although matters of evidence are seldom to be reviewed under certiorari, the decisions below are submitted as being 'shockingly wrong and thus present substantial due process questions. *Thompson v. City of Louisville*, 362 U. S. 199 (1960).

This matter will upon objective review be found to be so devoid of evidentiary support as to render the actions of the district and appellate courts as unconstitutional deprivations of his rights.

The First Circuit in its haste and desire to join with the mass media and the general public in the lynching of Connolly has misapprehended and grossly misapplied a deferential standard of review in a manner that cannot and should not stand. In fact, it is virtually standardless. It is reflective of a culture within the first circuit in which 'deference' is a euphemism for complicity. App. 47a-50a. It most certainly fails to provide that judicial counterweight to excessive executive action that is the bulwark

against the tyranny of a police state

The proper functioning of the federal judiciary requires that when an appellate court departs so far from the accepted and usual course of judicial proceedings or sanctions such a departure by a lower court, it is wise, proper and essential to the cause of justice that this Court exercise its supervisory power. *Florida v. Rodriquez*, 469 U.S. 1, 7 (1984), *Mallory v. United States*, 354 U.S. 449 (1957), *Elkins v. United States,* 364 U.S. 206 (1960).

Connolly speaks not of error-correcting. This matter involves an intentional subverting of Connolly's constitutional rights in a manner that is only understandable by appreciation of stated and anticipated animus evidencing an egregious lack of impartiality mandating supervisory intervention.

This is not merely a case in which a circuit may have misapplied a constitutional standard when evaluating the significance of potentially exculpatory evidence *Kyles v. Whitley*, 514 U.S. 419, 422 (1995). This has been a summary disregard of such evidence. The asseverations and revisions by the First Circuit should not stand as an acceptable substitute for a proper, wise, informed, sincere and objective opinion. We can repose no confidence in the opinion of or the process adopted by the First Circuit.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Edward J. Lonergan
Counsel of Record
101 Merrimac Street, Suite 810
Boston, MA 02114-9601
617-371-0430

February 2008

United States Court of Appeals
For the First Circuit

No. 05-2772

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN J. CONNOLLY, JR.,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, U.S. District Judge]

Before

Lipez, Circuit Judge,
Selya, Senior Circuit Judge,
and Howard, Circuit Judge.

Terrance J. McCarthy, by Appointment of the court, with whom Edward J. Lonergan and E. Peter Mullane were on brief, for appellant.

William J. Nardini, Special Attorney, with whom Michael J. Sullivan, United States Attorney, and John H. Durham, Special Attorney, were on brief, for appellee.

October 16, 2007

SELYA, Senior Circuit Judge. Defendant-appellant John J. Connolly, Jr., a disgraced former agent of the Federal Bureau of Investigation (FBI), appeals from the denial of his motion for a new trial in a celebrated criminal case. Connolly musters multiple theories in support of his appeal, all of which emanate from the same trove of newly discovered evidence. Unimpressed by the quality of this evidence and constrained by a deferential standard of review, we conclude that the district court acted within the encincture of its discretion in denying the motion.

I. BACKGROUND

The federal courts are by now painfully familiar with the Winter Hill Gang and its corrupt relationship with the Boston office of the FBI. See, e.g., United States v. Flemmi, 225 F.3d 78 (1st Cir. 2000); United States v. Salemme, 91 F. Supp. 2d 141 (D. Mass. 1999); United States v. Salemme, 978 F. Supp. 343 (D. Mass. 1997). The appellant has been prominently featured in several such opinions. See, e.g., McIntyre v. United States, 367 F.3d 38 (1st Cir. 2004) (addressing civil suit filed by putative victims' heirs against the appellant and others). To flesh out the background, there is a published opinion in this case, upholding the appellant's conviction on direct review. See United States v. Connolly, 341 F.3d 16 (1st Cir. 2003) (Connolly I). We assume the reader's familiarity with these opinions and rehearse here only those facts most directly relevant to this appeal.

Beginning in the early 1970s, the appellant was an FBI agent in Boston. During his tenure, he served as the "handler" of two "top echelon" informants: James ("Whitey") Bulger and Steven

("the Rifleman") Flemmi. Although nominally part of the Winter Hill Gang, Bulger and Flemmi frequently consorted with the Boston branch of La Cosa Nostra and purported to transmit inside information to the FBI concerning organized crime activities in New England. This relationship persisted until 1990 — the year of the appellant's retirement — when the FBI cut the umbilical cord and "closed" Bulger and Flemmi as informants.

Notwithstanding their former alliance, the FBI knew (or at least suspected) that Bulger and Flemmi had been hip-deep in criminal activity all along. An intensive federal probe ensued. In December of 1994, the FBI's case against Bulger, Flemmi, and their cohorts was poised to precipitate an indictment. The indictment, scheduled to be rolled out on January 10, 1995, targeted the two quondam informants as well as several other mobsters. Despite the veil of secrecy attached to grand jury proceedings, two of the targets — Bulger and Francis ("Cadillac Frank") Salemme — fled before the indictment was unsealed.

In short order, the indictment was made public; several defendants, including Flemmi, were arrested; and Bulger and Salemme became fugitives. Nearly eight months later, the authorities apprehended Salemme in Florida. Bulger remains at large.

Four years after the initial indictment, a different grand jury handed up a related indictment. This second indictment named both Flemmi and the appellant as defendants. Pertinently, it charged the appellant with racketeering, obstruction of justice, and conspiracy. A superseding indictment, fashioned in October of

2000, added a charge of making a false statement as well as additional counts of obstruction of justice.

The superseding indictment sketched a corrupt relationship between the appellant and the Winter Hill Gang. In the course of that relationship, the appellant allegedly sold protection, the identities of FBI informants, and the like to Bulger and Flemmi in exchange for a googol of bribes and favors. The relationship allegedly continued even after the appellant retired; one of his final acts was said to be the tip to Bulger and Salemme that allowed them to abscond before the looming indictment materialized.

The appellant proclaimed his innocence and stood trial on the superseding indictment. The jury found him guilty on charges of racketeering, obstruction of justice, and making a false statement. See 18 U.S.C. §§ 1962(c), 1503, 1001. On September 16, 2002, the district court sentenced him to 121 months in prison followed by two years of supervised release. We affirmed both his conviction and his sentence. See Connolly I, 341 F.3d at 35.

On May 27, 2005 - almost three years to the day after the jury returned its verdict - the appellant moved for a new trial. See Fed. R. Crim. P. 33. The motion rested on four categories of newly discovered evidence, each of which (according to the appellant) undermined the case against him and contributed to a showing that the government had acted unlawfully.

The first of these proffers constituted an FBI 302 report. That report, promptly disclosed to the appellant's counsel and the trial judge by the government, memorialized the accusations of a

confidential source (CS). The CS, himself a mobster of some repute, recounted purported jailhouse conversations with Salemme (who had been a prominent witness at the appellant's trial). According to the CS, Salemme, while incarcerated, had recanted almost the entirety of his testimony, confessing that he had perjured himself and describing how the government had urged him down the path of prevarication.

The appellant's second evidentiary proffer consisted of a 2004 report by the Committee on Government Reform of the United States House of Representatives. H.R. Rep. No. 108-414 (2004), available at http://www.gpoaccess.gov/serialset/creports/everything-secret.html. That report, titled in part "The FBI's Use of Murderers as Informants," is a caustic chronicle of the dark side of the FBI's relationship with organized crime spanning three decades (from the mid-1960s through the mid-1990s). The appellant offered the report in an apparent effort to show that the United States Attorney's Office in Massachusetts was no stranger to internal misconduct.

The appellant's third proffer comprised a list of alleged discrepancies between the testimony of witnesses who had testified at his trial and things that those same individuals subsequently said in depositions taken in a gallimaufry of civil actions. Fourth, and finally, the appellant pointed to Salemme's recent indictment for making false statements to federal agents.

The government opposed the motion. As part of its opposition, it submitted affidavits from five members of the prosecution team, three of whom

were lawyers and all of whom flatly denied any knowledge of misconduct or perjury.

On November 15, 2005, the district court summarily denied the motion. The court acted without holding a hearing and saw no need to write a rescript. This timely appeal followed.

II. ANALYSIS

The appellant's briefs present four different, but interrelated, theoretical bases for relief. These rest on (i) newly discovered evidence; (ii) withholding of evidence by the government; (iii) prosecutorial misconduct (related to perjury and the withholding of evidence); and (iv) manifest injustice. We address the first two theories as an ensemble. We then comment upon the absence of an evidentiary hearing. Finally, we explain, albeit briefly, why we need not consider the appellant's third and fourth theories.

A. The Preserved Theories.

The appellant's first two theories implicate newly discovered evidence and the withholding of evidence, respectively. Both of these closely related theories were squarely raised below and, thus, are properly preserved. Consequently, we consider them on the merits. We start, however, with the applicable legal standards.

A district court's disposition of a Rule 33 motion for a new trial in a criminal case is ordinarily a "judgment call." United States v. Maldonado-Rivera, 489 F.3d 60, 65 (1st Cir. 2007). Hence — at least where the trial judge revisits the case to pass upon the new trial motion — an appreciable measure of respect is due to the "presider's sense of the ebb and flow of the recently concluded trial." United States v. Natanel, 938 F.2d

302, 313 (1st Cir. 1991). We therefore review such rulings solely for abuse of discretion. See United States v. Alicea, 205 F.3d 480, 486 (1st Cir. 2000). Of course, a district court abuses its discretion whenever it predicates its ruling on an erroneous view of the law, see United States v. Snyder, 136 F.3d 65, 67 (1st Cir. 1998), and abstract questions of law engender de novo review, see United States v. Josleyn, 206 F.3d 144, 151 (1st Cir. 2000). A claim that the district court applied an incorrect standard falls within this purview.

The appellant attempts to complicate this rather straightforward set of rules. First, he claims that different standards of review apply to motions for new trials in criminal cases depending upon whether governmental withholding of evidence is alleged. Insofar as the standard of review is concerned, we implicitly have rejected that distinction in earlier cases, see, e.g., Maldonado-Rivera, 489 F.3d at 65; Josleyn, 206 F.3d at 151, and we explicitly reject it here.

Second, the appellant contends that the order appealed from should be reviewed de novo because the district court summarily disposed of his motion without composing an opinion. This contention is unpersuasive. While we always value an elaboration of the district court's reasoning, it has long been recognized that a written rescript is not a sine qua non for the disposition of a new trial motion in a criminal case. See, e.g., United States v. Manaieri, 694 F.2d 1270, 1284-87 (D.C. Cir. 1982); United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980); United States v. Holy Bear, 624 F.2d 853, 856 (8th Cir. 1980). Nor does the lack of such a rescript automatically trigger a more searching

standard of appellate review. When the trial court has not expounded its rationale, the court of appeals will peruse the record, identify the issues and the controlling legal rules, and review the denial of the motion accordingly. Cf. United States v. Malpica-Garcia, 489 F.3d 393, 395 (1st Cir. 2007) ("[W]e may affirm a district court judgment on any ground supported by the record.").

We turn from the standard of review to the standards that attend the resolution of a criminal defendant's motion for a new trial on the basis of freshly discovered evidence. Typically, the defendant must make a four-part showing: (i) that the evidence was unknown or unavailable to him at the time of trial; (ii) that his failure to learn of it did not result from a lack of due diligence; (iii) that the evidence is material, not merely cumulative or impeaching; and (iv) that its availability is likely to bring about an acquittal upon retrial. United States v. Huddleston, 194 F.3d 214, 218 (1st Cir. 1999); Wright, 625 F.2d at 1019. Every element of this test (known in this circuit as the "Wright test") is essential, and a failure to establish any one element will defeat the motion. Maldonado-Rivera, 489 F.3d at 66.

A somewhat different paradigm applies when the defendant makes a colorable claim that he would have had access to the newly discovered evidence but for the government's failure to disclose it in accordance with the imperatives of Brady v. Maryland, 373 U.S. 83, 87 (1963). See United States v. Gonzalez-Gonzalez, 258 F.3d 16, 20 (1st Cir. 2001). This more defendant-friendly standard applies, then, to what are colloquially known as "Brady violations."

There are three components of an authentic Brady violation. The evidence at issue (whether exculpatory or impeaching) must be favorable to the accused; that evidence must have been either willfully or inadvertently suppressed by the government; and prejudice must have ensued. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). For purposes of a new trial motion, the same standard applies to claims that the government knowingly used perjured testimony. Gonzalez-Gonzalez, 258 F.3d at 21. That standard, however, does not extend to the unwitting use of perjured testimony. Huddleston, 194 F.3d at 221.

Although we have said that this standard (which we shall sometimes call the "Brady standard") is defendant-friendly, that does not mean that proof of a Brady violation automatically entitles a defendant to a new trial. Even a defendant who moves for a new trial on the basis of one or more Brady violations still must establish the first two elements of the Wright test. The difference affects only the latter two elements; in a Brady scenario, those elements are replaced with the unitary requirement that the defendant establish "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985); see Kyles v. Whitley, 514 U.S. 419, 434 (1995) (characterizing that "reasonable probability" as sufficient to "undermine[] confidence in the outcome of the trial").

At least two other nuanced differences distinguish the two standards. First, the Wright test demands an actual probability that the result

would have differed, whereas the Brady test speaks in terms of something less — a merely theoretical (but still reasonable) probability. See United States v. Sepulveda, 15 F.3d 1216, 1220 (1st Cir. 1993). Second, the Wright test categorically discounts "merely impeaching" evidence as "immaterial." Wright, 625 F.2d at 1019. When a Brady violation is involved, however, the Wriaht materiality inquiry disappears as a distinct element, with the result that undisclosed impeachment evidence, if it suffices to undermine confidence in the outcome of the trial, may carry the day. See, e.g., Bagley, 473 U.S. at 682 (applying Brady test to impeachment evidence); United States v. Dumas, 207 F.3d 11, 16 (1st Cir. 2000) ("[W]e recognize that impeachment evidence, if powerful enough, could constitute grounds for a new trial ....")

Against this backdrop, we consider the "new" evidence proffered by the appellant to see how that evidence fares. As a preliminary matter, we note the appellant's allegation that all of this evidence is prejudicial and that almost all of it would have been available to him at trial but for the government's wrongful withholding.[1]

This is a dubious premise. The law is settled that "[n]o inference of government knowledge of perjury arises from the mere fact of a convict's hearsay report that a material witness recanted testimony." Gonzalez-Gonzalez, 258 F.3d at 23. In an abundance of caution, however, we elect to

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[1]One prominent exception consists of Salemme's alleged perjury with respect to his involvement in the murder of Stephen DiSarro. We discuss that proffer separately. See text infra.

examine this evidence under the more defendant-friendly Brady standard. Should the appellant's challenges fail under this standard, then a fortiori they would fail under the more stringent standard applicable to non-Brady claims. See Joslevn, 206 F.3d at 148 n.2.

The appellant places most of his emphasis upon Salemme's jailhouse recantation. To recapitulate, Salemme had been a witness at the appellant's trial. His testimony was helpful to the prosecution; he testified, among other things, that on several occasions the appellant had given assurances that he would keep Salemme apprised of developments with respect to the ongoing federal investigation. Salemme also testified that, on January 5, 1995 — two weeks after the appellant allegedly had leaked information about the nascent indictment — he had met with Flemmi and other mobsters at the home of Salemme's ex-wife; that Flemmi had informed him that the indictment was about to be unsealed; and that Flemmi knew that fact thanks to the appellant.

Importantly, however, Salemme's testimony did not occur in a vacuum. Several other witnesses corroborated aspects of it. Most notably, Kevin Weeks, Whitey Bulger's former aide-de-camp, testified extensively about the appellant's corrupt relationship with the Winter Hill Gang. For example, Weeks described an episode that transpired on December 23, 1994, when he met with the appellant at a local Winter Hill hangout. The appellant summoned him into a cold-storage freezer and informed him of the impending indictment. Others - such as the appellant's secretary, Kathleen Orrick, and his high-school

chum, John Ford - testified to Salemme being in the appellant's company at roughly the times that Salemme claimed to have been. Salemme's ex-wife, Alice McLaughlin, also confirmed that the January 5 meeting took place at her abode. Thus, although Salemme testified to a number of things as to which no other witness had personal knowledge, much of his testimony received substantial circumstantial corroboration.

As a counterpoint to this testimony, the appellant proffers the FBI 302 report. That report describes the CS befriending Salemme while both men were in the witness protection program. According to the CS, Salemme recounted a litany of prosecutorial misconduct, interwoven with tales of his own mendacity. The CS attributed the following kinds of statements to Salemme:[2]

- The government had shaped his narrative by asking questions such as,"are you sure it didn't happen like this?" and then describing alternate versions of events.
- Salemme came to realize that the prosecutors wanted him to testify that he had paid the appellant for information, so he obliged.
- Prior to the unsealing of the indictment, Salemme had never met the

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[2] Neither party disputes that the CS's statement to the FBI was made during the fall of 2004. Thus, the statement was not available at the time of trial and the appellant could not have obtained it earlier with even the utmost diligence.

appellant and was able to recognize him only because the FBI had furnished him with a photograph.

- Salemme ascribed his willingness to help convict the appellant to profound hatred stemming from what the appellant had done to Salemme and his family.
- When shown an article about someone sentenced to several years in prison for perjury, Salemme stated that if the article was accurate, he himself should receive "a thousand years."

This is an illustrative list, not a complete compendium — but it suffices to set the stage for our discussion.

The appellant's rationale is that the report demonstrates that Salemme's trial testimony was made up out of whole cloth. But even if we assume, favorably to the appellant, that the CS faithfully recounted Salemme's rodomontade, the district court easily could have found that recantation unworthy of credence and insufficient to shake its confidence in the jury's verdict. We explain briefly.

"It is well established that recantations are generally viewed with considerable skepticism." United States v. Carbone, 880 F.2d 1500, 1502 (1st Cir. 1989). Here, the wisdom of that insight is evident. As a mafioso turned government witness, Salemme had called both his honor and his safety into question. It would seem only natural, then, that he would try to rationalize his actions and insulate himself from their consequences. See, e.g.,

Gonzalez- Gonzalez, 258 F.3d at 22 (taking into consideration in Brady inquiry the witness's incentives for recantation given the risk that she might meet defendant in the future); United States v. Badger, 983 F.2d 1443, 1457 (7th Cir. 1993) (discounting probative value of affidavit in light of threats of jailhouse retaliation against affiant); United States v. Leibowitz, 919 F.2d 482, 483 (7th Cir. 1990) (describing affidavit as "not worthy of belief" in light of affiant's psychological frailty and the threats likely communicated by defendant).

The mixture of braggadocio and self-serving excuses contained in the recantation fits this pattern. And Salemme likely would have thought that he had little to lose by boasting about his ostensible perjury in the prison yard to a fellow mobster; there would have seemed to be little chance that the statements could come back to haunt him. In short, Salemme's recantation, like many jailhouse recantations, lacked any meaningful indicia of reliability and, therefore, was "properly regarded as 'highly suspicious.'" United States v. Walker, 25 F.3d 540, 549 (7th Cir. 1994) (citation omitted); see United States v. Goodwin, 496 F.3d 636, 641 (7th Cir.2007) (noting that inmate composed the recanting affidavit under threat of coercion and later withdrew it); United States v. Baker, 479 F.3d 574, 577-78 (8th Cir. 2007) (refusing to credit hearsay jailhouse recantation by trial witness); Gonzalez-Gonzalez, 258 F.3d at 22 (describing evidence as weak when it depended upon the credibility of convicted felons and those under threat of retaliation for their prior adverse testimony).

To be sure, the inference of unreliability that

arises from the circumstances of the recantation is merely permissive. Here, however, that inference is reinforced by the record. When one examines the individual assertions that the CS attributes to Salemme, a worrying pattern emerges: many of Salemme's readily verifiable assertions are demonstrably false. We offer a few examples.

First, Salemme supposedly told the CS that his prison term was to be commuted in exchange for his perjured testimony. But the record belies that assertion: it shows unequivocally that the terms of Salemme's reduced sentence were left to the determination of the district court, not the prosecution. For his part, the prosecutor did not advocate for Salemme's release from incarceration but, rather, recommended a 16-month sentence reduction (from 136 to 120 months).

Second, Salemme supposedly told the CS that he did not know the appellant before his indictment and arrest. Yet two independent witnesses — Orrick and Ford, each of whom was favorably disposed to the appellant — testified very clearly to the contrary. And to add frosting to this particular piece of cake, the record reflects that the appellant personally arrested Salemme in 1972. The district court certainly did not have to accept hook, line, and sinker the totally implausible notion that Salemme could so perfectly turn the other cheek as to expunge from his memory the law enforcement officer who placed him under arrest and set in motion a chain of events that led to him spending 16 years in a federal penitentiary.

Third, and finally, Salemme supposedly told the CS that he had been pressured by the prosecutors. However, the trial record contains

nothing that would suggest that this was so. The government filed affidavits from no fewer than five members of the prosecution team flatly denying that any such misconduct had occurred. These affidavits have a patina of plausibility since virtually all of Salemme's initial debriefings were conducted in the presence of his attorney.[3] These debriefings were consistent with the testimony that Salemme later gave at the appellant's trial, and one could just as easily believe in the tooth fairy as believe that a lawyer of Cardinale's stature was complicit in the most brazen sort of prosecutorial misconduct.

These are neither minor nor collateral matters.[4] They go to the very heart of the issues

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[3] Salemme was represented by Anthony M. Cardinale, a veteran criminal lawyer. In an earlier, unrelated opinion, we had occasion to quote from an article in Boston magazine chronicling Cardinale's storied career and noting that "[e]very troubled mobster in [Boston] kisses Cardinale's ring sooner or later." United States v. Boylan, 898 F.2d 230, 258 n.17 (1st Cir. 1990) (quoting "All in the Family," Boston magazine, Aug. 1988, at 18).

[4] The government also argues that Salemme lied when, in the course of his recanting statements, he boasted of having perjured himself by testifying as to giving money to the appellant. The government claims that this boast is clearly belied by the trial transcript, according to which Salemme testified to no more than having given money to Flemmi for the purpose of paying it to the appellant.

In this regard, we think that the government demands too much precision, especially given the casual context of the alleged recantation. Salemme plausibly could claim having testified to paying the appellant, even if that testimony did not indicate in haec verba that Salemme personally handed over the cash. Indeed, the government itself appears to have adopted this interpretation of Salemme's testimony; in his

upon which the recantation is meant to shed light. Although the fact that a recantation is peppered with apparent falsehoods does not compel a court to discredit it, that fact certainly gives the court sufficient reason to invoke the hoary doctrine of falsus in uno, falsus in omnibus.[5] A court may reject a recantation on that basis.

Two final considerations cement our intuition that the appellant has failed to demonstrate an abuse of the district court's discretion. For one thing, no evidence has been presented suggesting that Salemme himself would be willing, under oath, to admit to perjury. Relatedly, there has not been a credible argument put forth as to how th hearsay account contained in the FBI 302 report could be introduced into evidence. Cf. Fed. R. Evid. 801(d)(1) (defining as non-hearsay prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding"); 804(b)(3) (providing exception for statements against interest when declarant is unavailable). These deficiencies weigh in the balance against reversing the district court's exercise of its

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summation to the jury, the prosecutor argued that Salemme had testified that "he and Flemmi had been paying money to John Connolly" and that "they had paid $5,000 . . .to Mr. Connolly." We should not place greater demands for precision upon a prison-yard conversation than upon an account provided by a prosecutor in open court.

[5] Although the maxim "falsus in uno, falsus in omnibus" may be fallacious when understood as a mandatory rule of inference, see Dicenso v. Michaels, 668 F.2d 633, 634 (1st Cir. 1982), it retains validity as a basis for a permissive inference, see, e.g., Kanawha & M.R. Co. v. Kerse, 239 U.S. 576, 581 (1916); Castaneda-Castillo v. Gonzales, 488 F.3d 17, 23 (1st Cir. 2007) (en banc); Yongo v. INS, 355 F.3d 27, 33(1st Cir. 2004).

discretion. See United States v. Rosario-Diaz, 202 F.3d 54, 66 (1st Cir. 2000) (discounting the force of new evidence in a Brady inquiry in light of the evidence's likely inadmissibility).

For another thing, even assuming that the recantation were true, it would not prove very much. In his musings to the CS, Salemme gave no indication that the appellant was innocent of the charged crimes. In this sense, his recantation, if believed, would merely be impeaching and, consequently, would have a limited effect upon the outcome of a new trial in which substantial corroborating testimony existed.[6]

Along the same lines, the recantation would to some extent be cumulative. During cross-examination, the jurors learned much about Salemme's unsavory past. They knew, for example, that he was a career criminal who had blood on his hands in consequence of numerous murders and other violent crimes. The jurors also knew the details of his plea bargain with the government.

Given Salemme's extensive criminal history, it would not have been an abuse of discretion for the district court to find that the absence of additional cross-examination on essentially the same well-developed theme would not undermine

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[6] Though the Brady test does not treat impeachment evidence with the same categorical wariness as does the Wright test, this Court in applying Brady has recognized that the force of impeachment evidence is diminished when the witness's testimony is supported by substantial corroborating evidence, see Gonzalez-Gonzalez, 258 F.3d at 22-23, or when the impeachment evidence is "cumulative or collateral." United States v. Sanchez, 917 F.2d 607, 619 (1st Cir. 1990) (citation and internal quotation marks omitted).

confidence in the jury's verdict. See United States v. Cruz-Kuilan, 75 F.3d 59, 63 (1st Cir. 1996); see also United States v. Sanchez, 917 F.2d 607, 618-19 (1st Cir. 1990) ("Impeachment evidence, even that which tends to further undermine the credibility of the key Government witness whose credibility has already been shaken due to extensive cross-examination, does not create a reasonable doubt that did not otherwise exist when that evidence is cumulative or collateral.")(quoting United States v. Shelton, 588 F.2d 1242, 1248 (9th Cir. 1978)).

In this instance, all roads lead to Rome. For the reasons limped above, the jailhouse recantation, even if it occurred, did not require the granting of a new trial.

This conclusion does not end our odyssey. The appellant's motion for a new trial rested on more than Salemme's alleged recantation, so we need to inspect those additional items of "new" evidence.

We start with the appellant's frequent and tantalizing references to a recently issued congressional report and a series of depositions taken over the course of several civil suits arising out of the maraudings of the Winter Hill Gang. Given the passing nature of these references, it is an open question whether the appellant has waived any right to have us consider this evidence. See, e.g., United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (explaining that "issues adverted to in a perfunctory manner" are deemed abandoned). For ease in exposition, however, we assume that the answer to this threshold question is favorable to the appellant and consider the impact of the evidence. As we shall explain, it contributes very little to the

appellant's cause.

The congressional report falls to the wayside on relevancy grounds. The report, issued by the Committee on Government Reform of the United States House of Representatives, communicates the Committee's low opinion of the FBI's Boston field office in regard to its handling of organized crime matters from the mid-1960s to the mid-1990s. The report also raises a suspicion that, during a 1997 Department of Justice investigation, the United States Attorney's Office withheld evidence that Bulger and Flemmi had been the beneficiaries of federal prosecutorial discretion.

These portions of the report, along with the Committee's complaints about the Department of Justice's ready resort to executive privilege, make interesting reading — but they have nothing to do with the appellant. This trial concerned the lawfulness vel non of the appellant's actions — a subject as to which the report does not speak. Material of such dubious relevance cannot be the basis for the granting of a new trial. See Rosario-Diaz, 202 F.3d at 67 (finding newly discovered evidence purporting to establish victim's involvement in drug operations irrelevant to defendants' conviction for murdering her); United States v. West, 672 F.2d 796, 799-801 (10th Cir. 1982) (holding that newly discovered Department of Justice inquiry into alleged prosecutorial misconduct was not relevant to defendant's guilt).

The deposition testimony is newly discovered in the sense that the civil proceedings for the most part post-dated the appellant's indictment and trial. Many of those excerpts are at least arguably relevant, even though they touch upon predicate

acts of which the appellant was not ultimately convicted. As we concluded on direct review of the appellant's conviction, the jury could have relied upon evidence of those acts in finding him guilty of participating in a continuing criminal enterprise. See Connolly I, 341 F.3d at 27. Relevancy aside, however, the deposition testimony suffers from a different infirmity: the testimonial inconsistencies noted by the appellant are of meager weight. To illustrate, we offer a representative sampling.

The appellant observes that Weeks's trial testimony and Flemmi's deposition testimony conflict as to the length of time that Weeks controlled a particular Winter Hill fund. Unrebutted, though, is the more salient fact, testified to by both men, that the bribes paid to the appellant came out of that fund.

Next, the appellant notes that Weeks's trial testimony about John McIntyre's murder is arguably inconsistent with his deposition testimony in a civil case brought by McIntyre's heirs. At trial, Weeks testified that Bulger murdered McIntyre after learning from the appellant that McIntyre had become a snitch; in his deposition, Weeks seemed to imply that Bulger killed McIntyre because he found him "weak and [not to] be trusted." But these answers are not necessarily inconsistent and, at any rate, the appellant's responsibility for McIntyre's demise was not in issue at trial (that is, the government never charged the appellant with criminal conduct with respect to McIntyre's death). Thus, this "new" evidence could not logically have affected the jury's verdict.

The appellant also envisions an inconsistency between Weeks's testimony that an FBI informant,

Halloran, was outed by the appellant and the deposition testimony of a mysterious individual named Ronald Costello that Halloran's informant status was public knowledge. Here, again, there is no necessary contradiction between the two statements (and, thus, no basis for believing that the jury verdict hung in the balance).

Wholly apart from these bits and pieces of evidence, the appellant proffers yet a fourth category of newly discovered evidence. He notes that, on October 27, 2004, a federal grand jury indicted Salemme, alleging that Salemme had deceived federal prosecutors in plea negotiations by falsely denying his involvement in the gangland murder of Stephen DiSarro.

This proffer spotlights an apparent falsehood in Salemme's testimony during the appellant's trial. On cross- examination, Salemme denied having participated in any murders while at the head of La Cosa Nostra in New England. That testimony reiterated a statement that he had made to prosecutors in negotiating his plea bargain. The government cannot square the circle. If it believes that facts exist that prove Salemme's involvement in DiSarro's slaying — and the recent indictment indicates that it does — it cannot be allowed to argue that Salemme was wholly truthful in his trial testimony in this case.

As it happens, this possible perjury is, for present purposes, of minor moment. DiSarrc's murder occurred in the course of a criminal enterprise separate from the Winter Hill Gang and remote from the appellant. Furthermore, the jury already was aware of Salemme's nefarious past and had good reason to believe that his every word was

not deserving of unqualified respect. In these circumstances, the district court was fully entitled to conclude that neither this alleged perjury nor the attribution of one more murder to Salemme was likely to taint his other testimony.

This situation closely approximates the one before us in Sanchez. There, in the context of a Brady inquiry, we considered the materiality of undisclosed evidence of payments from the Commonwealth of Massachusetts to a witness, made in exchange for the witness's services as an informant. See 917 F.2d at 618. In concluding that the payments were immaterial, we noted that those payments were dwarfed by similar payments made by the federal government — these latter payments having in fact been disclosed — and that the Commonwealth's payments had been for services unrelated to Sanchez's case. Id.

That completes our canvass of the appellant's proffers of newly discovered evidence. None of them creates any plausible basis upon which to question the integrity of the verdict. And here, the whole does not exceed the sum of the parts: it cannot fairly be said that these proffers, each of which is asthenic, gain strength by aggregation. Taken together, they do not impugn the verdict. See, e.g., Dumas, 207 F.3d at 18.

In all events, as an appellate tribunal we must cede appropriate deference to the trial court with respect to the granting or denial of a new trial motion. See Alicea, 205 F.3d at 486. That deference is magnified where, as here, the judge who considered the motion presided over the trial itself. Natanel, 938 F.2d at 313. Viewed from this vantage point, there is no principled way that we can say

the district court abused its discretion in finding this congeries of evidence insufficient to undermine its confidence in the jury verdict.

B. The Need for an Evidentiary Hearing.

The appellant has a fallback position. He asseverates that the district court should, at the very least, have granted his motion for an evidentiary hearing on the new trial motion.

The baseline rule is that a "criminal defendant has no absolute or presumptive right to insist that the district court take testimony on every motion." United States v. Panitz, 907 F.2d 1267, 1273 (1st Cir. 1990). Accordingly, when considering the question of whether an evidentiary hearing should be granted in connection with a Rule 33 motion, a district court should ask if the defendant made a threshold showing sufficient to warrant such a hearing. Alicea, 205 F.3d at 487. In pursuing this inquiry, the court must make a practical, commonsense evaluation. When, for example, the motion is "conclusively refuted . . . by the files and records of the case," an evidentiary hearing would be supererogatory. Carbone, 880 F.2d at 1502; accord Gonzalez-Gonzalez, 258 F.3d at 23.

The short of it is that evidentiary hearings on new trial motions in criminal cases are the exception rather than the rule. Such motions ordinarily are decided on the basis of affidavits, without convening evidentiary hearings. See United States v. Kearney, 682 F.2d 214, 219 (D.C. Cir. 1982). Even disputed matters of fact arising from post-trial motions "are often properly decided on the basis of affidavits." United States v. Abou-Saada, 785 F.2d 1, 7 (1st Cir. 1986) (Breyer, J.).

The granting of an evidentiary hearing lies within the district court's sound discretion, and the denial of an evidentiary hearing is reviewed for abuse of that discretion. United States v. Colon-Munoz, 318 F.3d 348, 358-59 (1st Cir. 2003). The court of appeals should defer, within wide margins, to the district court's assessment — at least when, as in this instance, it is reasonable to believe that the district court possesses a more finely honed sense of the situation and a superior feel for the facts. See, e.g., United States v. Winter, 663 F.2d 1120, 1155 (1st Cir. 1981).

On this record, we see nothing that would demand an evidentiary hearing. The district judge had presided over the trial and was steeped in the lore of the case. The appellant's position, as it appeared from the papers submitted to the court, left few avenues for additional corroboration. There was no showing below — and there has been none here — that an evidentiary hearing was either necessary or desirable. Consequently, we hold that the district court acted within the realm of its discretion in denying the appellant's request.

C. The Unpreserved Theories.

This leaves the appellant's theories of prosecutorial misconduct and manifest injustice. The appellant failed adequately to raise either of these theories at the trial-court level. His original motion for a new trial did not advert to either theory, and his reply to the government's opposition did not remedy this omission.

To be sure, the term "prosecutorial misconduct" can be found scattered throughout the record below. But these sporadic allusions to prosecutorial misconduct are unaccompanied by

any attempt at developed argumentation and are bereft of any citations to relevant authority. They are, therefore, waived. See Paterson- Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 990 (1st Cir. 1990) ("One should not be allowed to defeat the system by seeding the record with mysterious references to unpled claims, hoping to set the stage for an ambush should the ensuing ruling fail to suit."); see also Zannino, 895 F.2d at 17.

As for manifest injustice (a shorthand for the theory that the district court's supervisory powers should have been exercised to overturn a verdict procured by egregious falsehoods and government misconduct), the appellant's filings below contain not even a glancing mention of this point. A theory that makes its debut in the court of appeals is perforce unpreserved; "[lit is a bedrock rule that when a party has not presented an argument to the district court, she may not unveil it in the court of appeals." United States v. Slade, 980 F.2d 27, 30 (1st Cir. 1992).

IV. CONCLUSION

We need go no further. The evidence newly discovered by the appellant is, in Judge Bownes's phrase, "not the straw that would have broken the camel's back; it was just more chaff to scatter in the wind." United States v. Martorano, 663 F.2d 1113, 1119 (1st Cir. 1981). Even under the more defendant-friendly Brady standard, we cannot say that this evidence undermines our confidence in the jury's verdict or justifies a finding that the district court abused its discretion in failing to vacate the judgment and order a new trial.

Affirmed.

United States Court of Appeals
For the First Circuit

No. 05-2772

UNITED STATES

Appellee

v.

JOHN J. CONNOLLY, JR.

Defendant –Appellant

Before

Boudin, Chief Judge,
Tomella, Circuit Judge,
Selya, Senior Circuit Judge,
Lynch, Lipez and Howard, Circuit Judges.

ORDER OF COURT
Entered: November 14, 2007

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:
Richard Cushing Donovan, Clerk

By: _____
Chief Deputy Clerk

[cc: Terrance J. McCarthy, Esq., E. Peter Mullane, Esq., Edward J Lonergan, Esq., William J. Nardini, AUSA, John H. Durham, AUSA. John J. Connolly, Jr.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No: 05-2772

UNITED STATES,

Appellee

v.

JOHN J. CONNOLLY, JR.,

Defendant - Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

PETITION OF JOHN J. CONNOLLY, JR. FOR REHEARING EN BANC

John J. Connolly, Jr., ("Petitioner"), in support of this petition for a rehearing en banc, states that this proceeding involves a matter of exceptional importance that will affect public confidence in the administration of justice within the circuit because of unanswered allegations of judicial bias throughout the circuit that precludes open and salutary review of pervasive and continuing prosecutorial misconduct. The Petitioner, a former highly decorated agent of the Federal Bureau of Investigation, is in solitary confinement for ten (10)

years because a series of murderers and felons were able to trade false and scripted testimony as part of a prosecutorial scheme: a scheme which also included withholding significant exculpatory evidence and which has continually been countenanced and shielded by a judiciary that is patently and predictably prejudiced. The Petitioner was convicted in the United States District Court for the District of Massachusetts for certain criminal acts for which there was subject matter jurisdiction under 28 United States Code §3231. The trial judge adopted without comment a pre-sentence report that included other conduct not found by the jury to have been proven beyond a reasonable doubt (the "other conduct") and trebled the sentence to 121 months. The conviction and sentencing were affirmed by this court on August 14, 2003. *United States v. John J. Connolly, Jr.*, 341 F. 3d 16 (2003) (the "First Opinion").

Petitioner timely and duly filed on May 27, 2005, a motion for a new trial, (the "Motion"), together with a supporting memorandum and a series of exhibits. The government filed a response in opposition on August 1, 2005, including a series of affidavits. Petitioner filed a reply, with exhibits, on November 4, 2005.

The substantial and complex materials were received and then, within little more than eight working days, on November 15, 2005, the Motion was denied without comment or opinion. At the same time the trial judge also summarily denied without comment, opinion or required evidentiary hearing the Petitioner's motion for a 2255 reduction in sentence. These were actions characterized by the Petitioner as being consistent with the trial judge's continuing, predictable and disturbing predilection

regarding Petitioner and reflective of an impermissible bias. The Petitioner timely filed a Notice of Appeal of the denial of the Motion and on October 16, 2007 a judgment and opinion entered (the "Opinion")[1], which upheld and sustained the action of the trial judge.

The Petitioner submits this petition for a rehearing en banc because the Opinion is neither an objective nor a complete analysis of the relevant record and facts, but a decision which relies upon an *ad hominem* attack upon the Petitioner for sustenance. This is not a surprise to the Petitioner who predicted in his petition for an en banc hearing or recusal filed on November 20, 2006 that he would not be treated with objectivity because it has been accepted **'as a fact beyond critical review within this circuit that the (he) is a former rogue agent of the Federal Bureau of Investigation.'** The denial of that petition without comment by this circuit is also consistent with a continued bias and prejudice which evidence that the avenues of justice within the entire circuit remain closed to the Petitioner. (i.e., an application for mandamus: denied without decision; the 2255 appeal: denied in an abbreviated decision that shielded the pattern of intemperate, incorrect and prejudicial behavior of the trial judge from public view). The Opinion also is a subtle and sophisticated effort to rework and reshape critical components of the First Opinion.

The Petitioner is not a seer. However, psychic powers are not necessary to discern the extent and perniciousness of the bias prevailing throughout the circuit. The conclusion of the Opinion is foretold

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[1] The Opinion inaccurately notes Edward J. Lonergan as having been with court appointed counsel on brief.

without doubt as the first sentence begins tellingly and gratuitously: "Defendant-appellant John J. Connolly, Jr., **a disgraced former agent of the Federal Bureau of Investigation.**" A search of the circuit's decisions does not reveal any defendant---murderer, rapist, robber, arsonist, mobster, pedophile, traitor, extortionist, sadist, accountant, lawyer, doctor, or entrepreneur---being described as 'disgraced' or otherwise so denigrated. This patent and unprecedented lack of discretion and professionalism makes clear that the Petitioner was correct in his grave apprehension that his cause would and does remain beyond objective review[2].

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[2] As Petitioner noted in his prior petition: "This court issued an abbreviated Judgment on August 30, 2006 in the Petitioner's appeal from a denial of his motion to vacate sentence in the related matter of *John J. Connolly, Jr. v. United States* (No. 05-2773). If this appeal be denied with the same formulaic conclusion, it shall then be clear that no claim by Petitioner is deemed worthy of review and that a final judgment has been preordained----intentionally or subconsciously. There is no other explanation discernible to the Petitioner for the disappointing silence of this circuit regarding the details of judicial behavior by the trial justice that, except for obvious and controlling bias, would be deemed inexplicable, improper and bizarre.

And: The trial justice, at the direction of this circuit, issued a certificate of appealability. Upon request by this circuit for explication or designation, the trial justice then denied the same and for the first time articulated his animus by petulantly concluding that "(t)he Petitioner had a full and fair trial and a full and fair hearing on appeal" and the matter was to be ended. Of course, this makes manifest that it is this inapposite standard that is continually, carelessly, casually and erroneously being applied to any matter submitted by or for the Petitioner for that court's review. This court's consideration of this behavior as having no effect upon the substantive rights of the Petitioner is beyond Petitioner's comprehension, particularly in light of the refusal to make

The experience of the Petitioner within this circuit is such that that it is virtually certain that he is on a fool's errand and that this petition shall be denied without comment. However, he and his family are without alternative but to continue to hope that one member of the circuit will yet objectively examine the record in its entirety. This faint hope is based upon the firm and unequivocal contention that such an examination shall make apparent that the convictions of the Petitioner cannot withstand scrutiny that includes all of the relevant and uncontested facts. It is with neither hesitation nor qualification that the Petitioner asserts that logic compels the conclusion that the Opinion is in error. It is equally advanced that only emotion, bias and prejudice can explain the willingness of the trial justice, the circuit and the general public to allow the saga to continue without true, complete and objective examination.

The fatal and tragic flaw in the analyses relating to the need for an evidentiary hearing and a new trial reflects the failure of the panel to acknowledge the prosecution's successful ability to maintain the bifurcation of the proceedings before Judge Wolf and the defendant's trial before Judge Tauro. This procedural bifurcation is essential to the prosecution's strategy of insulating from scrutiny the relevant, substantial and inimical acts of misconduct committed by Assistant United States Attorney Wyshak which violate the petitioner's substantive rights. It is there that Salemme and Weeks were prepped, instructed and threatened.

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specific note or comment upon these serial failings. This effectively deflects public attention from the serious judicial shortcomings of the trial justice---and indirectly countenances prosecutorial misconduct---- at the expense of the Petitioner.

The bad cop/counsel sits at the bench with intentionally circumscribed knowledge, while the worse cop/counsel remains hidden behind the mirror. Alas, although we all know he is there, only this court can provide access. Yet, the panel makes no reference to the one character heralded in the local media as the true, effective and impressive force of the prosecution.

These cases—and the respective prosecution teams are inextricably intertwined and one cannot appreciate the nature and extent of the prosecutorial misconduct of which the Petitioner complains without lifting the shroud. The fact that they are intertwined was made obvious at the oral argument. On three separate occasions the member of the panel renowned for insisting on the selection of words of precise meaning referred to the rulings and actions of Judge Wolf----not Judge Tauro. This did not occur three times as mere slips of the tongue. These constitute a revealing Freudian confirmation of the Petitioner's continuing contention that the truth cannot be known without full disclosure (i.e., a disclosure which includes the actions and inactions of the entire prosecutorial team). If the circuit is going to continue to allow Wyshak to be that wizard behind the curtain, then none shall know as a matter of judicial record what has been truly occurring in this wonderful world of ours and, consequently, justice cannot obtain.

The Petitioner cannot be successful in his quest if the circuit does not recognize the evil or the peril. However, the facts upon which he bases his prayers for relief are not in dispute. There have been a series of actions and inactions that constitute judicial indifference and disdain and pervasive and inimical prosecutorial misconduct which remain

effectively beyond review. The Opinion denies such review with rhetorical flourishes that create a sense of plausibility much like the strokes of an artist create a comforting bucolic setting on a canvas. This loss of the forest for the trees has not been happenstance. The creation of the appearance of plausibility is in the tradition of the Sophists and that places the Petitioner in the unhappy role of Socrates.

The failure of the Opinion to place the denial of his motion for a new trial in context with a series of actions and inactions by the trial judge converts a putative respect for a deferential standard to one of complicity reflecting shared bias and prejudice. Although the Opinion assumes 'the readers familiarity' with a series of high profile cases in which the Petitioner is 'prominently featured', there is no attempt to provide balance or perspective by making any mention of the Petitioner's serious allegation that the examination in a vacuum by the circuit of the denial by the trial judge is intended to and does insulate the trial judge from critique for a demonstrative animus toward the Petitioner.

The Opinion weaves its threads of plausibility by subtly seeking to correct errors in several assertions in the First Opinion. For example, James Bulger and Stephen Flemmi were then described specifically as "members of the Winter Hill Gang (who) reported (to the FBI) on the activities of both the Gang and La Cosa Nostra". They are now, without explication, described as being "nominally part of the Winter Hill Gang". And Kevin Weeks, who was designated by this circuit as 'the government's star witness', has been unceremoniously and quietly demoted from 'Bulger's 'right-hand man'" to "Whitey Bulger's former aide-

de-camp". These are not matters of minor consequence because they go deep into the core of the government's contention that the Petitioner was involved in a corrupt enterprise. This was the 'enterprise' trumpeted in the First Opinion and upon which the racketeering conviction rested. It is now quietly relegated to an ancillary and insubstantial position. Thus the deteriorating underpinnings of the Petitioner's conviction are being shored. This work of reclamation also includes a new, unproven and incorrect fact that would ascribe to the FBI the "case against Bulger and Flemmi and their cohorts" in December of 1994. It was, and of this there is no dispute, a secret effort intentionally separated from the FBI. This subtlety is properly regarded by the Petitioner as an intentional effort to use a subliminal association of the Petitioner, even though retired for five years, with an active FBI investigative effort to which he might have had access. Absolutely untrue, of course, but most helpful to reinforce the profile necessary to maintain the inaccurate and contrived public image of the rogue agent developed over the years and now a part of accepted lore within the culture of the courthouse.

The Opinion also casually references a 'superseding indictment fashioned in October of 2000...add(ing) a charge of making a false statement as well as additional counts of obstruction of justice'. However, it does not note that this is the indictment that added the date of the 'tip' as being December 23, 1994: a date that was crucial to the government's ability to satisfy a serious statute of limitations barrier. It also does not note that this allegation came solely from the circuit's former 'star witness', Kevin Weeks. Nor does it mention that

Weeks was interviewed and handled solely by the Wyshak team.

The Opinion tacitly undercuts another matter of common knowledge based upon these 'familiar proceedings': Whitey Bulger is able to continue to elude capture because he specifically benefited from that 'tip' on December 23, 1994 of the imminence of a 'secret indictment'. Now, again without explication, the Opinion acknowledges without fanfare that "**the indictment was made public** (and) several defendants, including Flemmi were arrested...". The Petitioner's conviction cannot be deemed beyond doubt when the theme of the First Opinion is now discredited by the panel itself.

The Petitioner realistically and rationally senses and feels like one who has been virtually lynched by a determined and frenzied mob. The Petitioner notes without self-pity the irony that mobsters are continually accorded respect and professional treatment (e.g., *Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006)), while he is relegated to the inner circles of Dante's *Inferno* with the Sisyphean task of trying to gain the objective attention of the gods.

There is and can be no dispute as to the facts upon which the Petitioner advances the Motion and for which he seeks a rehearing en banc. The consistency of the actions and inactions of the trial justice lend themselves solely to the conclusion of an impermissible and egregious bias---a bias the circuit shares.

A cataract of dramatic publicity concerning the Petitioner and those several proceedings with which he is directly and indirectly involved has formed the public belief that justice has already

been achieved with respect to the Petitioner and no further proceedings are truly necessary.

The Petitioner accurately anticipated that the Opinion would be a negative conclusion supported by the same formulaic reasoning that the circuit used when it denied the Petitioner's appeal of a failure to have his sentence vacated. It remains unfortunately true that no claim by Petitioner is deemed worthy of review and that all final judgments are preordained.

The Opinion sets forth as fact that the government submitted as part of its response 'affidavits from five members of the prosecution team, three of whom were lawyers and all of whom flatly denied any knowledge of misconduct or perjury'. However, the Opinion ignores the fact that the language is couched so as to be personal and limited. It does not, in fact, vouch for others within the *de facto* team of prosecutors. This is intentionally intended to keep the Wyshak team beyond questioning. This perplexes and distresses the Petitioner beyond ability to express without anger since Wyshak---using the same purported evidence---now is a special prosecutor in Florida in a matter charging the Petitioner with murder. It is harsh that this circuit ignores facts which preclude an effective challenge to the Petitioner's convictions.

The Opinion also ignores the fact that within the courthouse there is universal knowledge that Salemme is challenging his current indictment because, *inter alia*, he was questioned in the absence of counsel at the same time that he was being 'prepped' for the testimony against the Petitioner. Yet, the Opinion takes obvious relish in noting the celebrity of the attorney who is alleged to

have been present at such interviews. It is known that this is simply not true.

The Opinion asserts that there is no evidence that Salemme would be willing to testify. This ignores public knowledge that Salemme was arrested and placed beyond the power of interview because he was incarcerated in parts unknown---a harsh and continuing treatment before trial for a charge limited to lying to a federal official but very consistent with making him unavailable to Petitioner.

The details of judicial behavior by the trial justice would be inexplicable and bizarre except for bias. It is also mere replication of the disdain exhibited by the trial justice's ignoring of the pleas of the Petitioner for help when he was allowed to be placed in a position of extreme peril by the prosecution. This circuit in a rare and limited, but much appreciated and positive, intervention incidental to the mandamus petition, forced the government to place Petitioner in protective custody.

The Petitioner makes note of the following as an introductory, but not exhaustive, list of facts that remain unconsidered when reviewing the convictions or the Motion:

> The alleged "tip" on December 23, 1994, to Bulger that permitted him to flee and successfully elude capture cannot be deemed reliable when considered in light of the fact that Bulger had signed his own name on a hotel register in New Orleans on December 31, 1994, and was returning to Boston on the Massachusetts Turnpike on January 5 when he heard on the radio that Flemmi had been

arrested and has since become legendary in his apparent ability to remain free;

The theme that the "tip" concerned information that was secret and not shared by anyone in the investigative community is completely exposed as a sham when the front page of the Boston Globe on January 6, 1995, reveals Shelly Murphy's thorough and informed description of the arrest of Flemmi and the details of the strategy of the investigation, including imminent indictments;

The 'other acts' upon which the Petitioner's sentence was extended by more than six (6) years are now considered by the prosecution to not be 'matters of moment': the same facts upon which the First Opinion relies to uphold punishment in the extreme;

The Wyshak team was the subject of an order by Judge Wolf making inquiry into their practices as prosecutors in *U.S. v.* Salemme, 91 F. Supp. 2d 233 (D. Mass., 1999), an order that corroborates the Petitioner's allegation regarding improper prosecutorial conduct that violated his right to a fair trail;

The prosecution provided false and substantial information to the Petitioner, including a 302 Report concerning former Assistant United States Attorney Jeremiah T. O'Sullivan that he, a member in good standing of the bar of the Commonwealth of Massachusetts, characterizes as being 'replete with errors';

The prosecution scripted the testimony of Kevin Weeks by presenting him in its

opening as a 'member of the Winter Hill Gang' and Bulger's right-hand man'--- a scripting so successful that the circuit characterized him as the 'star witness': a characterization that is now being muted in the Opinion as a result of---but with no reference to--- the Petitioner's discovery of this scripting;

The Salemme 302 is a very sensitive document because it not only serves to seriously undermine the critical testimony of a mobster, it implicates the prosecutors in a scheme to coerce testimony. This resulted in the Salemme 302 being vetted by independent counsel in the Chicago Office of the US Attorney (the same counsel who prosecuted Scooter Libby) and the material is deemed reliable.

Salemme was arrested for lying, but not for perjury in the Petitioner's case, at a time and in a manner that reveals it as a Wyshak ploy to remove Salemme from inquiry and to otherwise insulate the underlying prosecutorial actions from public and judicial review;

The Salemme 302 and his staged incarceration and isolation show that the prosecution knew that he was committing perjury when he testified against Petitioner;

Lead trial counsel, John H. Durham, was part of the presenting team 'caught' (the prosecutor's word, not the Petitioner's) by a committee of congress for knowingly participating in a process of concealing exculpatory materials which showed the

government's theory, allegations, evidence and arguments to be false.

It is the Petitioner's unholy lot to be the cornerstone providing essential support for public acceptance of the results in a myriad of high profile criminal and civil cases within the circuit. Proper relief for the Petitioner necessitates uncomfortable ramifications. It is an easier task to tacitly consider the Petitioner as a collateral victim in a war on crime than to ensure that his convictions were properly obtained and maintained. This is simply wrong and this court should permit the Petitioner true and effective access to the paths of justice.

A hearing of the entire court is proper and fitting to ensure that the Petitioner's serious allegations of judicial bias and prosecutorial misconduct have been considered objectively and completely.

JOHN J. CONNOLLY, JR.
By his attorney,

Edward J. Lonergan
BBO # 303960
Suite 800
101 Merrimac Street
Boston, MA 02114-9601
617-371-0430
617-227-7177
edwardlonergan@aol.com

CERTIFICATE OF SERVICE

I, Edward J. Lonergan, hereby certify on this 30th day of October, 2007, that a copy of the foregoing "PETITION OF JOHN J. CONNOLLY, JR. FOR REHEARING EN BANC " has been duly served upon Petitioner's appellate counsel and counsel for the United States of America by first class mail, postage prepaid, addressed as follows:

Terrance J. McCarthy
354 Washington Street
Braintree, MA 02184

John H. Durham
Assistant U. S. Attorney
U. S. Attorney's Office
23rd Floor
157 Church Street
New Haven, CT 06510

_____

Edward J. Lonergan

United States Court of Appeals
For the First Circuit

No. 05-2772

UNITED STATES,
Appellee,

v.

JOHN J. CONNOLLY, JR.,
Defendant, Appellant.

Before

Boudin, Chief Judge,
Torruella, Lynch, Lipez and Howard,
Circuit Judges.

ORDER OF COURT Entered:
April 3, 2007

Appellant's request for an initial en banc hearing is denied.

By the Court:
Richard Cushing Donovan, Clerk.

By: _____
Chief Deputy Clerk.

[cc: Terrance J. McCarthy, Esq., William J. Nardini, AUSA, John H. Durham, AUSA, John J. Connolly, Jr., E. Peter Mullane, Esq., Edward J Lonergan, Esq.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No: 05-2772

UNITED STATES,

Appellee

v.

JOHN J. CONNOLLY, JR.,

Defendant - Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

PETITION OF JOHN J. CONNOLLY, JR. FOR HEARING EN BANC OR RECUSAL

Now comes John J. Connolly, Jr. ("Petitioner") and petitions for a hearing en banc on his appeal of the denial of an extensive, complex, compelling and substantive Motion For New Trial (the "Motion") or, in the alternative, recusal by the members of this circuit. The denial of the Motion by the Honorable Joseph L. Tauro (the "trial justice") was rendered with neither opinion nor comment.

This appeal is a matter of independent moment for which summary relief is warranted solely on the record---or lack of record. It is, however, also inextricably related to a series of actions and inactions, including matters before this court, which raise questions of exceptional importance affecting public confidence in the administration of justice within this circuit. Persuasive and continued assertions of pervasive and inimical prosecutorial misconduct remain effectively beyond judicial review.

The separation of powers is a safeguard in our system intended, *inter alia,* to ensure that we do not inadvertently or otherwise create and countenance an institutional acceptance and use by prosecutors of hidden, fabricated and scripted evidence. This significant safety valve monitors, limits and controls such natural but base tendencies. Without pronounced judicial review of the Petitioner's allegations of pernicious prosecutorial misconduct, all defendants are exposed to such abuse.

Since facts truly are stubborn things, it is merely a question of time before there is a full and complete disclosure and assessment of the constituent parts of the sorry tragedy in which the Petitioner has been involuntarily cast as the antagonist. This knowledge will then, in the absence of a complete and transparent judicial review of the serious, credible and damaging matters raised in the Motion, compel reasonable and inquiring minds to conclude that during this time public confidence in the administration of justice within this circuit was misplaced.

This proceeding is a cornerstone of a myriad of high profile civil and criminal matters in which

the prosecution has successfully been able ***to have it accepted as a fact beyond critical review within this circuit that the Petitioner is a former rogue agent of the Federal Bureau of Investigation***. In this posture, virtually every effort to seek relief has been acted upon in a manner which may most generously be characterized as *indifference concomitant with disdain*[3]. This attitude represents a logical conclusion from plausible premises taken to be correct without analysis of the data upon which the premises are based.

This petition is submitted with the hope and confidence that the concepts of justice so nobly articulated on the stone carvings and inscriptions on the ground level of this courthouse---particularly the underlying history of the quote from Justice Holmes in the Jury Assembly Hall---are sources of inspiration, guidance, encouragement and instruction and not decorative platitudes. The continued absence of review of credible allegations of pervasive and substantial prosecutorial misconduct which has spawned judicial indifference

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[3] When the local press reported that one of the Petitioner's counsel expressed a concern that the summary denial of the Motion without comment or opinion by the trial justice meant that he must have a personal bias toward the Petitioner, the Chief Judge of the United States District Court for the District of Massachusetts, with neither hearing nor inquiry, made an immediate and public reference of the matter to the Massachusetts Bar Counsel for investigation in a manner intended to subject counsel----and Petitioner's cause--- to ridicule. The subsequent finding of no violation of any rule of professional conduct did not evoke any expression of regret by that judge for a precipitous and inappropriate public censure. This chilling judicial overreach is but one more reflection of the culture within the Moakley courthouse against which the Petitioner must contest.

and, at times, malevolence is a matter demanding intense examination.

The Petitioner seeks relief in reliance on the assumption that the path of his prosecution was to have been subject to this standard:

> **"It is axiomatic that the government must turn square corners when it undertakes a criminal prosecution. This axiom applies regardless of whether the target of the prosecution is alleged to have engaged in the daintiest of white-collar crimes or the most heinous of underworld activities." *Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006).**

This statement reflects the fact that prosecutorial misconduct in the office of the United States Attorney in this district is neither new nor novel. It is not deemed necessary to recite the litany of instances in which the prosecutors within this circuit have been seriously criticized by district and appellate judges.

It is submitted with neither hesitation nor qualification that an objective examination of the actions of the prosecution in the persecution of the Petitioner will reveal the same to be pernicious. None can be secure in basic rights, if such conduct is directly or indirectly countenanced.

The actions and inactions of the trial justice in ignoring the serious allegations of prosecutorial misconduct clash discordantly with the theme set forth in *Ferrara*. They also place in bold relief evidence of the accuracy of the recognition by this court of the natural human tendency to be affected by the nature of an alleged crime or perpetrator

which can and often does shift focus and alter standards of fairness and justice.

There is and can be no dispute as to the facts upon which the Petitioner advances the Motion and for which he seeks a hearing en banc. The consistency of the actions and inactions of the trial justice lend themselves solely to the conclusion of an impermissible and egregious bias.

This patent deficiency is likely to have been a factor contributing to the attitude and disposition of members of this circuit. It is quite human and not surprising that even justices of this ---or any--- circuit may be affected by an unending cataract of publicity of the type that has formed the public image of the Petitioner and those several proceedings with which he is directly and indirectly involved. The Petitioner believes that the period of eight (8) months for this court to make a *pro forma* appointment of appellate counsel is indicative of a concern that is less than proportionate to the serious, substantive and credible allegations of evil within the office of the United States Attorney[4]. This is consistent with the prejudice that the circuit apparently---and understandably--- shares with the public in the belief that justice has already been achieved with respect to the Petitioner and no further proceedings are truly necessary.[5]

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[4] This belief is further strengthened when the Petitioner notes the speed with which a virtual *ex parte* motion to extend the time for the prosecution to file its brief was recently, casually, immediately and summarily granted so as to further extend the Petitioner's ordeal for an additional sixty (60) days before this matter may be considered.

[5] As Justice Holmes said in his classic address at the Boston University School of Law: "(T)he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which

A hearing en banc is necessary and appropriate to ensure that justice is our common and achievable goal. Although every motion for a new trial which is sincerely and properly advanced is worthy of thoughtful consideration, the Motion is unusual in that there will be impacts throughout the circuit and beyond if it is properly granted.

This court issued an abbreviated Judgment on August 30, 2006 in the Petitioner's appeal from a denial of his motion to vacate sentence in the related matter of *John J. Connolly, Jr. v. United States* (No. 05-2773). If this appeal be denied with the same formulaic conclusion, it shall then be clear that no claim by Petitioner is deemed worthy of review and that a final judgment has been preordained----intentionally or subconsciously. There is no other explanation discernible to the Petitioner for the disappointing silence of this circuit regarding the details of judicial behavior by the trial justice that, except for obvious and controlling bias, would be deemed inexplicable, improper and bizarre.[6] This silence----replicating

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judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

[6] The trial justice, at the direction of this circuit, issued a certificate of appealability. Upon request by this circuit for explication or designation, the trial justice then denied the same and for the first time articulated his animus by petulantly concluding that "(t)he Petitioner had a full and fair trial and a full and fair hearing on appeal" and the matter was to be ended. Of course, this makes manifest that it is this inapposite standard that is continually, carelessly, casually and erroneously being applied to any matter submitted by or for the Petitioner for that court's review. This court's consideration of this behavior as having no effect upon the substantive rights of the Petitioner is beyond Petitioner's

that in the denial of the Petitioner's request for mandamus---- is all the more striking when contrasted with the nuanced and impressive analysis recently presented by this court that included the very rare setting aside of a credibility determination in *United States v. Henderson*, 463 F. 3d 27 (1st Cir., 2006).

The fact that the trial justice would not discuss the contents of the Motion would ordinarily be surprising, confusing and of concern. However, the Petitioner and this circuit have already had an identical experience with the trial justice when ---- again without opinion or comment—the Petitioner was allowed to be placed in a position of extreme peril by the prosecution. It was this circuit's wise, timely and essential, though limited, intervention incidental to a mandamus petition that forced prosecutors to relocate Petitioner to proper protective custody. It is not hyperbolic to opine that had there not been such limited intervention, all present matters of moment would now be moot. (i.e., H. Paul Rico did not have the benefit of such intervention and he is dead from injuries received while so incarcerated).

It is a matter of serious concern and exceptional importance that this question be answered:

> **Is continued disregard of substantive and procedural due process to be accepted without analysis and comment when it is also a virtual**

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comprehension, particularly in light of the refusal to make specific note or comment upon these serial failings. This effectively deflects public attention from the serious judicial shortcomings of the trial justice---and indirectly countenances prosecutorial misconduct---- at the expense of the Petitioner.

shield preventing any review of indisputable facts evidencing pervasive prosecutorial misconduct?

This is a question mandating the attention of the entire court and its resources.

The Petitioner is mindful that a hearing en banc is extraordinary. The nature and extent of prosecutorial misconduct is in large measure presented beyond cavil. It has, in turn, been effectively and continually countenanced by the trial justice[7] and indirectly by this circuit. These allegations are too serious and the evidence too persuasive to be simply ignored[8].

It would not be surprising if this court shares the opinion of the trial justice and the general public that all matters advanced by the Petitioner are moot because of its decision upholding the Petitioner's RICO conviction. *United States v. Connolly,* 341 F. 3d 16, 20 (1st Cir. 2003). However, this court then acted because "Kevin Weeks, who identified himself as Bulger's 'right-hand man', was the government's star witness and provided substantial testimony regarding the existence of the enterprise."[9] It is now

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[7] The Petitioner notes the irony of the alacrity and expansiveness of the trial justice's actions in this matter when the moving party was The Boston Globe and/or the former head of the local mafia, Frank Salemme.

[8] An en banc court is to be "convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960).

[9] This court also took special note of Weeks' testimony establishing December 23, 1994, as the date of disclosure of forthcoming indictments—testimony developed long after the

established----not inferred---that this court was seriously misled by the prosecutors' scripting of testimony about facts deemed to be of crucial importance. Weeks now unequivocally states under oath that he was NOT Bulger's right -hand man and that he was NOT a member of the Winter Hill Gang (i.e., the enterprise).

The Petitioner and his family have, as any who are subjected to such matters, been exposed to continued shame and trauma. But he has been convicted and had a sentence tripled because of evidence now suspect beyond debate and in many instances a product of contrivance. A clear and impermissible prosecutorial pattern has continually been countenanced by the trail justice through methods and means that meet no rational standard of professionalism or common sense. This dramatic and unfettered discretion, no matter the sincerity of motive, is not and cannot be favored in a democracy.

This court has and should exercise the power to act summarily on this matter by setting aside convictions which cannot withstand scrutiny or by ordering a new trial.

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indictment of John Connolly and conveniently satisfying a date necessary to meet a statute of limitations hurdle. Of course, now, fifteen years later, it defies common sense to say that such a disclosure took place because James Bulger, acclaimed by all as a master of deception and still successfully in hiding, signed his birth name to a hotel register in New Orleans on December 31, 1994, and was returning to Boston when the media announced the arrest of Stephen Flemmi. Of course, common sense might also ask how the media was present at the arrest of a high profile criminal personality when his co-defendants were still at large. It certainly proves that information about arrests and indictments was being shared by the government with the media....and others?

If the court is not able to act in accord with its summary powers and obligations, then a reference to another circuit must fairly be considered. This circuit continually describes the Petitioner in a manner reflecting a negative conclusion as to his character that most certainly raises at least an appearance of a lack of objectivity.[10] The Petitioner regards this attitude to be part of cumulative and compelling evidence of a controlling predisposition to regard him with unforgiving hostility. It is common for such a predisposition to serve as a haze causing myopia. This is a human condition that is not abnormal, not unusual and not evil *per se*---but it is injudicious.

It is wrong that the Petitioner need continue to suffer the ignominious agonies of this saga. Common sense and common dignity call for an objective review by this circuit of the allegations of prosecutorial misconduct and judicial indifference reflecting bias. It cannot be questioned that there should have been an evidentiary hearing by the trial justice to assess, *inter alia*, the proper weight to be given to the prospective testimony of a confidential informant[11] who would have placed the altar boy testimony of admitted murderer--and don-- Frank Salemme in proper and logical perspective.

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[10] *Rakes v. Unted States*, 442 F. 3d 7(1st Cir. 2006) illustrates the fact that allegations and characterizations are becoming part of the fabric of the local judicial community and are being repeated as a virtual matter of judicial notice (e.g., "Connolly crossed a critical line...and...made the FBI a partner in some of the Winter Hill Gang's criminal enterprises", etc.).

[11] An informant and testimony deemed reliable and corroborated by the prosecutor of the Vice President's former chief of staff· a prosecutor with a well deserved national reputation for ability and integrity.

Is it not a proper matter of judicial concern that Frank Salemme was arrested and placed beyond the effective reach of the court and the Petitioner by incarcerating him in virtual parts unknown after charging him with lying to a federal official at the very time when the dramatic and damning evidence of a confidential informant was to be brought to light?

Is it not a cause to ponder why the trial justice refused to examine the fact that the charge for which Frank Salemme was arrested proves that the prosecutors know, and knew at the time, that he committed perjury when testifying at the Petitioner's trial?

Is it not worthy of examination to review materials prepared by the prosecution and submitted to and relied upon to his detriment by the Petitioner that are now known to be false?

Is it not a matter of proper inquiry to determine that the Assistant United States Attorney who prosecuted the Petitioner was 'caught' by the United States congress participating in the concealment of exculpatory materials showing the government's allegations, evidence and arguments to be false?

Is it not of interest to note that in the series of materials submitted by the prosecution to counter the anticipated testimony of a confidential informant regarding inducements and threats is most telling in that there is no reference to or affidavits from Salemme or his handlers (i.e., Wyshak, Doherty and Johnson)?

It is for the circuit, acting en banc, to lift this sorry saga from the tabloids and to return it to an open and objective judicial proceeding where the

true interests of the public in the integrity of the administration of justice within our circuit shall be advanced. None of us is secure when prosecutors can literally run amok.

Each of us has an absolute duty to ensure that a highly decorated federal officer with a long and distinguished career---distinguished in large measure by the danger he continually faced by maintaining at the direction of his superiors the same associations for which he is now condemned---- not be incarcerated without our being certain that there be no taint to the evidence upon which he was convicted:

- evidence from a mafia don arrested and imprisoned by the same Petitioner who has also been lauded as a prime cause of the decimation of that don's Boston office of La Cosa Nostra, which don was released from prison as a *quid pro quo* for such evidence (and who is now strategically imprisoned again for lying about the same matter that constituted perjury at Petitioner's trial);
- evidence from a serial killer who has never met the Petitioner and is soon to be released as a *quid pro quo* for such evidence;
- evidence from an admitted killer proclaimed as Bugler's right hand man and 'member of the gang' who never was either and was released to become an author as a *quid pro quo* for such evidence;
- evidence from the Petitioner's superior, an admitted felon, who was granted immunity and lives on a federal pension in Florida as a *quid pro quo* for such evidence; and
- evidence that was fabricated, scripted and hidden.

Each of us should happily strive to perform this duty.

There is no position of greater power or responsibility than that of the judiciary. There is no more challenging duty than to examine matters objectively and to render decisions consonant with our system of values. The goal of perfection is beyond us, but striving for that goal is all that separates us from despotism. It is a serious responsibility and now is the time for this court to assert its powers, assume its obligations, and bring clarity of purpose to ensure that we are constantly and fairly seeking justice.

JOHN J. CONNOLLY, JR
By his attorney,

Edward J. Lonergan
BBO # 303960
Suite 800
101 Merrimac Street
Boston, MA 02114-9601
617-371-0430
617-227-7177
edwardlonergan@aol.com

E. Peter Mullane, Esquire
BBO #360000
MULLANE, MICHEL &
McINNES
132 Mount Auburn Street
Cambridge, MA 02138-5736
Tel.: (617) 661-9000
Fax: (617) 661-2915
peter@3mlaw.com

Dated: November 20, 2006

CERTIFICATE OF SERVICE

I, Edward J. Lonergan, hereby certify on this 20th day of November, 2006, that a copy of the foregoing "PETITION OF JOHN J. CONNOLLY, JR. FOR HEARING EN BANC OR RECUSAL" has been duly served upon Petitioner's appellate counsel and counsel for the United States of America by first class mail, postage prepaid, addressed as follows:

Terrance J. McCarthy
354 Washington Street
Braintree, MA 02184

John H. Durham
Assistant U. S. Attorney
U. S. Attorney's Office
23rd Floor
157 Church Street
New Haven, CT 06510

_____
Edward J. Lonergan

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN J. CONNOLLY, JR Petitioner	)	
VS.	)	CIVIL ACTION NO. 2004-CV-12396-JLT
UNITED STATES OF AMERICA Respondent	)	

APPLICATION FOR CERTIFICATE OF APPEALABILITY

NOW COMES John J. Connolly, Jr. (the "Petitioner") and makes application for a certificate of appealabilty with respect to his appeal of this court's denial of his motion to vacate sentence under 28 U.S.C. 2255 (the "Petition"). This application is presented pursuant to 28 U.S.C. 2253, Rule 22 (b) (1) of the Federal Rules of Appellate Procedure and the mandate of the United States Court of Appeals for the First Circuit dated December 6, 2005, in the matter of *John J. Connolly, Jv. v. United States*, First Circuit No. 05-2773 (the "Appeal"). The Appeal cannot go forward until such time as this court issues the certificate or sets forth a statement as to why such certificate should not issue and, accordingly, it is respectfully requested that this application be forthwith acted upon.

The Petitioner shall raise the following issues on appeal relating to the deprivations of constitutional rights to due process under the fifth amendment and a jury trial under the sixth amendment:

A. The Petition was timely filed and of a form and substance so as to place before this court the necessity and appropriateness of vacating his sentence because of a misapplication of the then existing United States Federal Sentencing Guidelines in that this court---acting precipitously and without the benefit of an informed and dispassionate consideration of the factors that should guide the imposition of a just and fair sentence---used the 'preponderance of the evidence standard' for facts not found by the jury beyond a reasonable doubt or admitted to by Petitioner to enhance a sentence by eighty-four (84) months.

B. Although the Petition was stayed by this court at the request of the parties pending action on Petitioner's collateral motion for a new trial, and notwithstanding the fact that the government has made an unqualified admission that the predicate acts upon which this court originally acted to triple the Petitioner's sentence are not matters of moment, this court failed to conduct a hearing or to otherwise obtain the full and complete benefit of the facts and relevant evidence before it acted without articulation to deny the Petition and to once again deprive the Petitioner of the fundamental right to a full, open, fair and complete examination of the process of and reasons for the imposition of an extreme enhancement of Petitioner's sentence to 121 months.

C. This court:

i) failed and neglected to act sua sponte in response to the disclosure by the government of an unqualified admission of a position which is absolutely contradictory to those critical positions aggressively asserted

in prior and collateral proceedings, which admission evidences the injustices being perpetrated through prosecutorial misconduct upon the Petitioner, this court and the general public; and

ii) precipitously denied the Petition and contemporaneously denied the Petitioner's motion for a new trial---all without articulation;

in a summary and almost clerical disposition reflective of a lack of interest or appreciation of the substantive nature of the Petitioner's various claims for relief or, more likely, a bias and prejudice which should have prompted a voluntary recusal and will warrant remand by the First Circuit of the Petition to another justice.

D. That mandated recusal will now be deemed necessary and appropriate because of the continued failure of this court to conduct post-trial proceedings in accordance with the Petitioner's constitutional rights and expectations and in a manner which does not warrant public trust and confidence: a chilling and consistent failure which first was exhibited in the precipitous imposition of an egregiously enhanced sentence and repeated with the inexplicable refusal---again without articulated rationale--- to hear arguments regarding allegations that the prosecution was intentionally placing the Petitioner in a position of extreme peril by incarcerating him without safeguards in a state facility-which peril was only eliminated by the timely intervention of the First Circuit in response to Petitioner's request for mandamus which compelled a change in the conditions of

incarceration in the Florida jails so that the Petitioner was placed in the type of protective custody appropriate to one of his background.

DATED: December 26, 2005

Respectfully submitted,

JOHN J. CONNOLLY, JR.
By his attorneys,

/S/ Edward J. Lonergan

Edward J. Lonergan, Esquire
BBO #303960
101 Merrimac Street (Suite 800)
Boston, MA 021 14-9601
Tel: (617) 371-0430
Fax: (61 7) 227-71 77
E-Mail: edwardlonergan@,aol.com

/S/ E. Peter Mullane

E. Peter Mullane, Esquire
BBO #360000
MULLANE, MICHEL & McINNES
132 Mount Auburn Street
Cambridge, MA 02138-5736
Tel.: (617) 661-9000
Fax: (617) 661-2915
E-Mail: peter@,3mlaw.com

CERTIFICATE OF SERVICE

I, Edward J. Lonergan, Esquire, hereby certify that a true copy of the foregoing Application for Certificate of Appealability was duly served this 26th day of November, 2005, upon John H. Durham. Assistant U.S. Attorney, by first class mail, postage prepaid, addressed as follows:

John H. Durham, Asst.
U.S. Attorney
157 Church Street
(23rd Floor)
New Haven, CT 06510

/s/ Edward J. Lonergan

Edward J. Lonergan,
Esquire

United States Court of Appeals
For the First Circuit

JOHN J. CONNOLLY, JR.,
Petitioner, Appellant,

v.

UNITED STATES,
Respondent, -Appellee.

Before
Torruella, Lynch and Howard,
Circuit Judges.

JUDGMENT

Entered: August 30, 2006

After carefully reviewing the record, we deny petitioner's request for a certificate of appealability. We add only the following.

Insofar as petitioner seeks to rely on the decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000)~ and United States v. Booker, 543 U.S. 220 (2005), his claim fails because neither case is retroactively applicable to cases on collateral review. Sepulveda v. United States, 330 F.3d 55, 61-63 (1stCir.2003)

(Apprendi); Cirilo-Munoz v. United States, 404 F.3d 527, 532-33 (1st Cir. 2005) (Booker) . His claim that the sentencing court erred by failing to conduct judicial fact finding has already been rejected by this court on direct review. United States v. Connolly, 341 F.3d 16 (1st Cir. 2003). Since his

substantive claims are without merit, petitioner could not have suffered any cognizable prejudice from any alleged procedural errors below.

The request for a certificate of appealability is denied and the appeal is terminated.

By the Court :
Richard Cushing Donovan, Clerk.

By:
Chief Deputy Clerk.

[cc: E. Peter Mullane, Esq., Edward J Lonergan, Esq.,

John H. Durham, AUSA, William J. Nardini, AUSA, John J. Connolly, Jr.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
V.	)	CASE NO. 99-CR-10428-JLT
JOHN J. CONNOLLY, JR Defendant	)	

DEFENDANT JOHN J. CONNOLLY, JR.'S MOTION FOR THE GRANTING OF A NEW TRIAL RURSUANT TO BRADYAND RULE 33 OF THE FED. R. CRIM. P.

Now comes the Defendant, John J. Connolly, Jr., (hereinafter, the "Defendant"), by and through his undersigned counsel, and pursuant to Rule 33 of the Fed. R. Crim. P., and hereby moves this Honorable Court to grant him a new trial on all counts being the subject of the judgment of conviction.

In support hereof, the Defendant states the following:

1) The government knowingly and intentionally concealed exculpatory evidence that is favorable to the Defendant, and that was material and relevant to the establishment of his innocence and/or punishment. See, Brady v. Maryland, 373 U.S. 83,87,83 S. Ct. 1194, 1196 (1963), and its progeny, and the Due Process Clause of the United States Constitution.

2) If the government had not suppressed and/or concealed the exculpatory and material

evidence, there is more than a "reasonable probability" that the results of the proceeding would have been concluded differently. See, *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3379 (1985); and *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392 (1 976).

3) Since the jury did not hear and considered the suppressed and/or concealed exculpatory evidence, the Defendant did not receive a fair trial which could be understood as a trial resulting in a verdict worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419,434, 115 S. Ct. 1555 (1995).

4)Also, the existence of significant and substantial newly discovered evidence creates more than an actual probability that an acquittal would have resulted if the evidence had been available for due consideration by the jury. See, Rule 33 of the Fed. R. Crim. P., and *United States v. Josleyn*, 206 F.3d 144, 150- 151 (1" Cir.2000).

5) Finally, the Defendant has filed with the court "under seal" this same date his memorandum, together with exhibits, in support hereof, all of which are incorporated herein by reference and made a part hereof.

6) The Defendant respectfully reserves his right to amend and supplement the instant motion, as well as supporting documentation, as may be I appropriate to the fair and just adjudication of the merits hereof by the Court.

WHEREFORE, the Defendant respectfully requests that this motion for the granting of a new trial be hereby allowed.

REQUEST FOR EVIDENTIARY HEARING AND ORAL ARGUMENT

The Defendant respectfully requests that oral argument be allowed on the within motion, and that all necessary and appropriate discovery be permitted by the Defendant, together with an evidentiary hearing to be conducted thereafter by this court on the merits hereof.

DATED: May 27,2005

JOHN J. CONNOLLY, JR.
By his attorneys,
/s/ Robert M. Goldstein

Robert M. Goldstein, Esquire
BBO # 630584
20 Park Plaza (Suite 903)
Boston, MA 02116
Tel.: (617) 742-901 5
Fax: (61 7) 742-9016
E-mail: rmg04@aol.com

/s/ Edward J. Lonergan

Edward J. Lonergan, Esquire
BBO #303960
101 Merrimac Street (Suite 800)
Boston, MA 02114-9601
617-371 -0430
617-227-7177 fax
E-Mail:edwardlonergan@aol.com

/s/ E. Peter Mullane

E. Peter Mullane, Esquire
BBO #360000
MULLANE, MICHEL & McINNES
132 Mount Auburn Street
Cambridge, MA 02138-5736
Tel.: (617) 661 -9000
Fax: (617) 661-2915
E-Mail: peter@3mlaw.com

LOCAL RULE 7.1 CERTIFICATION

I, E. Peter Mullane, pursuant to Rule 47 of the F. R. Crim. P., and Local Rule 7.1, hereby certifies that he has in good faith attempted to confer with counsel for the government regarding all the issues raised in this motion, but the counsel for the parties hereto have been unable to narrow or reach a resolution of these issues as presented herein.

/s/ E. Peter Mullane

E. Peter Mullane

CERTIFICATE OF SERVICE

I, E. Peter Mullane, Esquire, hereby certify that a true copy of the foregoing Motion to Dismiss or New Trial and Memorandum was duly served this 27th day of May, 2005, upon John H. Durham, Assistant U.S. Attorney, by first class mail, postage prepaid, addressed as follows:

John H. Durham,
Asst. U.S. Attorney
U.S. Attorney's Office
157 Church Street
(23rd Floor)
New Haven, CT 06510

/s/ E. Peter Mullane

E. Peter Mullane, Esquire

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No:

In re: JOHN J. CONNOLLY, JR.,

Petitioner

PETITION OF JOHN J. CONNOLLY, JR. FOR A WRIT OF MANDAMUS

Relief Sought

Now comes John J. Connolly, Jr. ("Petitioner"), who on July 7, 2005, notwithstanding timely appeals for appropriate administrative and judicial protection, was intentionally, summarily and illegally removed from his secure federal custody in a facility suited to his 'high risk' status to a state jail in Florida (Affidavit of Attorney E. Peter Mullane, attached hereto as **Exhibit A**), and seeks the intercession of this court so as to:

1. avoid immediate and irreparable harm by the denial of his constitutional rights to:
    a.) personal safety;
    b.) due process; and
    c.) effective assistance of counsel; and
2. prevent the recurrence of prosecutorial practices which undermine both the integrity of and the public's confidence in the administration of justice within this circuit.

The Petitioner asserts that extraordinary and immediate relief directed to opening judicial proceedings which have become virtually 'secret' and to initiating objective and effective judicial examination of the conditions and circumstances of the Petitioner's incarceration and simultaneous prosecutions are absolutely necessary to enable the Petitioner to answer an indictment in the State of Florida for the charge of murder in the first degree (the "Indictment"). The Indictment, though issued by a grand jury convened in and for the Miami-Dade County, was initiated and obtained 'under seal' in the "Fall 2002" by the Office of the United States Attorney in Boston ("Local Prosecutors"). The Indictment constitutes a de facto and simultaneous federal prosecution being advanced in a distant and foreign jurisdiction so as to disrupt, delay and deflect complex and crucial post-trial proceedings in the matter of *United States v. John J. Connolly, Jr.*, Case No. 99-CR-10428-JLT, United States District Court for the District of Massachusetts and to otherwise deprive the Petitioner of his ability to meet and defend against multiple and varied activities of the Local Prosecutors. The Indictment is attached hereto as **Exhibit B**.

The specific requests for relief are the immediate issuance of a writ mandating the Honorable Joseph L. Tauro, the presiding Judge in the matter of *United States v. John J. Connolly, Jr.* (the "Trial Judge"):

> A) To forthwith release from seal any and all pleadings and documents presently filed in *United States v. John J. Connolly, Jr.* so as to enable Petitioner to have use of

all such documents as are necessary to ensure effective assistance of counsel in all criminal matters pending in Massachusetts and/or Florida;

B) To order and enjoin the Local Prosecutors from continuing their proceedings in Florida until after the disposition of all substantial post-trial motions pending in *United States v. John J. Connolly, Jr.*; and

C) To order Local Prosecutors to forth with obtain and facilitate the return of the Petitioner to the Low Security Correctional Institution at Butner, NC.

Issues Presented

Should the United States District Court Judge for the District of Massachusetts, the Honorable Joseph L. Tauro, be mandated in *United States v. John J. Connolly, Jr.*:

1) To unseal records and proceedings so as to enable the Petitioner, John J. Connolly, Jr., to have effective assistance of counsel in several matters, including an indictment for murder in the first degree in the state courts of Florida;

2) To effectively order the Office of the United States Attorney in Boston to cause to be enjoined its 'federal' criminal proceeding in a state court in Florida; and

3) To order Local Prosecutors to forthwith obtain and facilitate the return of the Petitioner to a federal facility in NC.

Facts

A series of acts by Local Prosecutors and inaction by the Trial Judge have cumulatively resulted in:

1.) Placing the Petitioner in a position of extreme personal peril;

2.) Denying him and his counsel of the ability to use relevant, persuasive, and exculpatory evidence held under seal, the unfettered use of which is essential to interposing a defense to a charge of first degree murder in Florida (the "exculpatory evidence"); and

3.) Permitting pervasive prosecutorial misconduct to continue without the protection of timely and objective judicial review.

The Petitioner had been in federal custody at the Low Security Correctional Facility at Butner, NC (the "Facility") and has served less than one-half of a ten (10) year sentence imposed by the Trial Judge in *United States v. John J. Connolly, Jr.* On May 26, 2005, a Request For Temporary Custody was filed with the Warden of the Facility (**Exhibit "C"**). This request was delivered to the Petitioner on June 7, 2005 (**Exhibit "D"**). The request is related to the Indictment to prosecute the Petitioner in Florida for "Murder 1st Degree and Murder 1st Degree/Conspire".

The Petitioner was entitled to and did timely and in good faith exercise his right to submit the appropriate REQUEST FOR ADMINISTRATIVE REMEDY (**Exhibit "E"**). He also was aware of and ready to exercise an additional right to appeal to the Regional Director within twenty (20) days of his

receipt of an adverse response, if any, to his request as provided and noted in Exhibit E. Accordingly, the transfer of the custody of the Petitioner to officials of the State of Florida was not expected to occur, if at all, until after he had exhausted his administrative rights of appeal (i.e., the earliest date thereof being July 26, 2005).

On July 5, 2005, the Petitioner filed in United States v. John J. Connolly, Jr. Emergency Motion of the Defendant, John J. Connolly, Jr., For Protective Order Staying His Transfer Of Custody To The State of Florida And For The Unsealing of These Proceedings (the "Emergency Motion"). A copy of the Emergency Motion is submitted 'under seal' and marked **Exhibit "F"**. Notwithstanding that the nature of the request for relief and its urgency were evident, the Trial Judge did not act on this vital matter. However, the Local Prosecutors did not fail to react.

The Petitioner was seeking protection from the dangerous and unnecessary transfer of custody until disposition in *United States v. John J. Connolly, Jr.* of his Rule 33 Motion For A New Trail, a motion of serious moment and substantial merit ("Rule 33 Motion") and for essential and effective access to and use of the exculpatory evidence. A copy of the Rule 33 Motion is submitted 'under seal' and marked **Exhibit "G"**.

It is of compelling significance to note that the Indictment was issued 'under seal' in 2004, but did not become public until it was presented in a staged national press conference on May 4, 2005, a media event conducted within days after the Local

Prosecutors were advised by Petitioner's counsel that a motion for a new trial was to be filed in *United States v. John J. Connolly, Jr.* The Rule 33 Motion includes substantial relevant material regarding a series of acts and failures to act by the prosecution and which Petitioner asserted denied him of his right to a fair trial.

The nexus between the Indictment and *United States v. John J. Connolly, Jr.* is made incontrovertible by the appearance and participation in the press conference by the lead Local Prosecutor, Assistant United States Attorney Fred Wyshak, who is to "assist in the Florida murder case". Miami Herald, May 5, 2005, attached hereto as **Exhibit "H"**. This Boston federal prosecutor stated that the Indictment "represents the climax of a decades-long prosecution of the Winter Hill Gang."

These materials also constitute credible and serious allegations of pervasive prosecutorial misconduct that Local Prosecutors, understandably, are striving to keep from congressional and public view. However, this concealment is unfairly and intentionally preventing Petitioner's counsel from protecting his constitutional rights. This deprivation is particularly and obviously onerous when coupled with the fact that the same prosecutors are now pursuing a simultaneous 'federal' murder proceeding under the guise of a distant and most inconvenient state criminal action. This transparent proceeding is intended to----and shall in the absence of judicial intervention and relief---deny the Petitioner of his ability to subpoena out of state witnesses essential to his defense and to impose

costs of litigation that are exorbitant and beyond his limited reach.

The government, in patent violation of Petitioner's administrative, statutory and constitutional rights and solely as a direct and preemptive reaction to the Emergency Motion, commenced the actual transfer of custody on the morning of July 7, 2005. The Trial Judge's clerk was immediately notified by telephone of the precipitous and preemptive reaction intended, inter alia, to render moot that portion of the Emergency Motion seeking the physical protection of the Petitioner. Within an hour of such notice, Petitioner's counsel was telephonically advised that the Trial Judge had denied the Emergency Motion in its entirety.

The Petitioner has been classified by the Bureau of Prisons as a prisoner of high risk and seriously exposed to danger because of his dual status as a.) a former member of the law enforcement community; and b.) a cooperating witness with State authorities in Kentucky regarding evidence he bravely obtained at his great peril while incarcerated in a medium security federal prison facility in Lexington, KY, regarding the brutal assassination of a young mother who was a government witness in a drug related federal prosecution.

The Petitioner, despite the obligation of Florida to hold the Petitioner "in a suitable jail that meets the level of security required by the Bureau of Prisons" was placed for several days in a holding cell with fifty (50) or more prisoners lying on the floor in a Miami-Dade County jail. (Exhibit A).

The reality of the nature and extent of physical risk and peril to the petitioner is confirmed by the fact that the Local Prosecutors targeted another former member of the law enforcement community in Boston, H. Paul Rico, in 2003. He was arrested on October 3, 2003 while healthy and ambulatory and was incarcerated in Miami-Dade County. Then he was subjected to a serious beating on December 5, 2003. Thereafter, he was forced to use a wheelchair, lost more than fifty (50) pounds and died on January 17, 2004. His family and attorney have continually alleged that the assault contributed significantly to his death.

It is challenging to consider all of the foregoing and simultaneously understand the failure of the Trial Judge to respond in any manner to the seriousness of the Emergency Motion which clearly set forth in bold and uncertain terms that the Petitioner sought protection in a critically time sensitive matter, especially after having been apprised that the government was taking preemptive action. It is equally difficult to comprehend an apparent lack of concern and action when considering the following:

A) The Indictment relates to the murder in Florida of John Callahan by John Martarano;
B) John Martarano was a witness for the prosecution in United States v. John J. Connolly, Jr. concerning the murder of John Callahan and the jury found the Petitioner not guilty of the charges related to this testimony;
C) John Martarano has never met the Petitioner;

D) The Indictment now purportedly will be advanced with the testimony of Stephen Flemmi, a notorious serial killer who the government had consistently maintained is a pathological liar;

E) Frank Salemme, another critical witness for the prosecution in United States v. John J. Connolly, Jr. has been arrested for, inter alia, perjury while so testifying;

F) The prosecutors have established a pattern of acting in ways to inundate the Petitioner and his counsel so as to undermine their ability to defend against a multiplicity of actions;

G) Credible and disturbing evidence about prosecutorial misconduct was filed in November, 2004, with the Trial Judge without substantive inquiry or action (Exhibit I, filed herewith under seal); and

H) The timing, nature and circumstances of simultaneous prosecutions is a matter which reasonably calls for at least a cursory judicial review of potential prosecutorial misconduct, especially when the availability of a nonfrivolous double jeopardy claim is of obvious relevance. See USA v. Laguna-Estela, No. 04-1554 (1st Cir. 01/12/2005).

The Petitioner has also been advised that he will not have access to The Office of the Public Defender in Florida due to a conflict of interest existing because that office represents the government's witnesses, Martarano and Flemmi. (Exhibit A). It is also to be noted that prosecuting a federal matter in a distant and foreign state jurisdiction about facts, which allegedly occurred in Massachusetts, means that the

Petitioner will be denied his federal right to subpoena out of state witnesses, notwithstanding the fact that the alleged conspiracy occurred within the Commonwealth of Massachusetts.

The Local Prosecutors have alleged that the Petitioner is guilty of identical crimes with respect to others killed by Flemmi and/or Martarano. However, those murders occurred in Massachusetts. It is not specious to ask this court to conclude that Local Prosecutors chose to initiate a 'federal' proceeding in a Florida state court for the sole purpose of overpowering the Petitioner with procedure so as to deny him an effective opportunity to contest any and all charges on the merits.

Reasons For Relief

A.) To unseal records and proceedings so as to enable the Petitioner to have effective assistance of counsel in several matters, including an indictment for murder in the first degree in the state courts of Florida.

It is beyond debate to question that criminal proceedings must be open to the public to guarantee a defendant's right to a fair trial and to maintain the appearance of fairness so essential to public confidence in the criminal justice system. Such openness is not to be compromised in the absence of a compelling reason. "Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 502 (1984).*

In November of 2004, the Local Prosecutors filed the exculpatory evidence in *United States v. John J. Connolly, Jr.*, and, without hearing or examination or any discussion with Petitioner's counsel, the Trial Judge accepted the same 'under seal'. This evidence can be fairly characterized as tending to show and confirm the pattern of prosecutorial misconduct about which the Petitioner has long complained and against which he continues to struggle.

It is not unfair to be concerned with the Trial Judge's failure to express appreciation of the obvious significance of this material and its proper role in a proceeding, which has been a prominent subject of local, state and federal media attention for more than ten (10) years. The Petitioner retired from the Federal Bureau of Investigation in 1990 as a then recognized national hero for his battle against organized crime. He now sits----lies---on the floor of a holding cell in a distant county jail as a discredited former Special Agent. An endless barrage of publicity that continually places the Petitioner in intense disrepute has victimized his wife and three teenage sons.

Openness in these proceedings is of traditional importance to the need of the public to know, or be ensured that interested parties know, the details of criminal proceedings. However, virtually closed proceedings cannot be maintained in a manner that denies the Petitioner his right to a fair trial. There has never been an examination by the Trial Judge of the need for concealment. The Petitioner argues, of course, that concealment is intended by the prosecutors to avoid the scrutiny that is essential to public confidence. This intent or motive is as likely

or more likely than any other. Nor has the Trial Judge examined or proposed methods or manners in which any purported interest of substance could be protected while the Petitioner's right to the protection of public attention and effective assistance of counsel would not be denied.

The petitioner cannot----simply cannot---defend against the Indictment without having effective access to the materials under seal. The failure of the Trial Judge to express by word or deed an appreciation of the Petitioner's perilous physical and procedural conditions cannot be regarded as being consonant with the gravity of the evidence, the patent and pervasive misconduct of the Local Prosecutors and the most basic right to due process (i.e., the opportunity to present a defense).

The rights of the Petitioner demand access and the writ should issue forthwith.

B and C.) To effectively order the Office of the United States Attorney in Boston to cause to be enjoined a 'federal' criminal proceeding in a state court in Florida and to order Local Prosecutors to forthwith obtain and facilitate the return of the Petitioner to a federal facility in NC

It is clear that under 28 U.S.C. §2283 that federal courts will not stay a pending state criminal prosecution except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Younger v. Harris, 401 U.S. 37 (1970). Although it is clear that extraordinary circumstances exist in that the Petitioner is exposed to palpable and irreparable

harm, the Petitioner submits that this standard is not applicable because the request for relief is NOT related to a state proceeding except in name. The Florida prosecutors have deputized Wyshak as prosecutor and Wyshak has confirmed that this prosecution is directly related to *United States v. John J. Connolly, Jr.*

The Indictment is a de facto and simultaneous federal proceeding being prosecuted by a United States Attorney. This prosecutorial charade cannot be deemed acceptable without compromising public confidence in the integrity of the administration of justice within this circuit.

It is also suggested it should have been a matter of concern to the Trial Judge that while an matter of urgency and moment was pending before him, the Local Prosecutors were circumventing him and his jurisdiction by preemption. The Trial Judge's response to this threat to the prestige and dignity of his court was to casually issue a verbal order of denial of the Emergency Motion in its entirety. Whatever the merits of the Petitioner's arguments, the failure of the Trial Judge to protect the integrity of the jurisdiction of the district court is a matter which affects all who share the ideal of a respected judicial system---human and flawed at times---but ever worthy of respect.

The Emergency Motion was virtually a request for the continuance of the federal proceeding in Florida until the disposition of the post-trial proceedings in United States v. John J. Connolly, Jr. The Petitioner has served almost three (3) years of a ten (10) year federal sentence. The Indictment was issued in the

Fall of 2004 but not acted upon until it could be used as a tool to deny Petitioner of his rights to safety, due process and effective assistance of counsel and only AFTER the Local Prosecutors knew that the Petitioner would be actively seeking to vindicate himself by using, inter alia, the exculpatory evidence. There is no harm to any state or federal interest by providing the relief essential to the preservation of the Petitioner's rights and the avoidance of irreparable harm and the writ should issue.

JOHN J. CONNOLLY, JR.
By his attorneys,

Edward J. Lonergan, Esquire
BBO #303960
101 Merrimac Street (Suite 800)
Boston, MA 02114-9601
617-371-0430
617-227-7177 fax
E. Peter Mullane, Esquire
BBO #360000
MULLANE, MICHEL & McINNES
132 Mount Auburn Street
Cambridge, MA 02138-5736
Tel.: (617) 661-9000
Fax: (617) 661-2915

Dated: July 14, 2005.

PROOF OF SERVICE

I, Edward J. Lonergan, hereby certify on this 14th day of July, 2005, that a true copy of the

foregoing Petition, without copies of those exhibits submitted 'under seal', has this day been provided by hand to The Honorable Joseph L. Tauro, District Judge, United States District Court for the District of Massachusetts, John Joseph Moakley U.S. Courthouse, One Courthouse Way, Boston, MA 02210 and duly served upon the respondent United States of America, the only other party to the proceeding, by mailing the same first class and postage prepaid to John H. Durham, Assistant U.S. Attorney, as follows:

John H. Durham,
Asst. U.S. Attorney
U.S. Attorney's Office
157 Church Street (23rd Floor)
New Haven, CT 06510

_____

Edward J. Lonergan

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No: 05-2067

In re: JOHN J. CONNOLLY, JR.,

Petitioner

SUPPLEMENT TO PETITION OF JOHN J. CONNOLLY, JR. FOR A WRIT OF MANDAMUS

Now comes John J. Connolly, Jr. ("Petitioner"), and submits this supplement to his petition for mandamus filed on July 14, 2005, so as to include copies of:

a) relevant administrative materials referenced in said petition, but unavailable at the time of filing due to his summary transfer from North Carolina to Florida; and
b) materials related to facts and events since the time of filing which further delineate the nature and extent of the 'federal' aspect of a de facto federal criminal proceeding in Florida.

Although the importance of the interests affected by this proceeding and the dignity of this court should not be diminished by a series of intemperate and *ad hominem* pleadings to be traded by counsel[1], it is

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[1] The statement that the pursuit of extraordinary relief is a *de facto* disparagement of the district court is an intemperate remark intended to

appropriate that this supplement also be submitted to ensure that the comments contained in the **Initial Response to Petition of John J. Connolly, Jr. For A Writ Of Mandamus** are not deemed to be in any way admitted by silence. It can be noted, however, that the government's response is most loud when it is most quiet. The Petitioner's initial incarceration in Florida was dangerous, uncontrolled and in violation of BOP requirements. That no evil occurred does not minimize the extent and seriousness of the failure to protect the safety of the Petitioner. It is not deemed by the Petitioner to be of a mind that the correction in the nature of the Petitioner's incarceration reflects the government's concern for the potential judicial and public attention being pursued by the Petitioner.

Bureau of Prisons - Administrative Appeal

The temporary custody of the Petitioner was transferred by the Federal Bureau of Prisons ("BOP") on July 7, 2005 to unnamed representatives of the State of Florida. His personal papers were forwarded to his counsel and received on July 15, 2005. These papers included a copy of the REQUEST FOR ADMINISTRATIVE REVIEW by the Petitioner to the BOP dated July 5, 2005, delivered to the Petitioner's counselor on July 6, 2005 and acknowledged as having been received by the BOP on July 7, 2005 (**Exhibit E-1**). The Petitioner was also provided with Form BP-S567.051 – Acknowledgment··· dated July 7, 2005, and upon which the Petitioner again noted his objection to the transfer of custody (**Exhibit E-2**).

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discredit the Petitioner and his counsel in the eyes of the trial judge and may have the effect of tainting the public's essential perception of objectivity. .

The Petitioner's request was denied in writing on July 7, 2005 (**Exhibit E-3**). To preserve his administrative rights and to ensure the exhaustion of any administrative remedy, the Petitioner through counsel filed an appeal by mail on July 20, 2005 with the BOR's Regional Director (**Exhibit E-4**).

The denial of the Petitioner's Request included the statement that the Petitioner had "20 calendar days from the date" thereof to appeal the denial with the Regional Director of the Federal Bureau of Prisons, Mid-Atlantic Regional Office. Nevertheless, custody of the Petitioner was immediately transferred and the Petitioner was transported to Florida and placed in a holding cell in the Miami-Dade County Jail for several days and nights. He was then relocated to an area designated for prisoners 'over 40".

On the afternoon of July 15, 2005, after the issuance by this court of an order directing the filing by the United States Attorney's Office of one component of a response on or before 5 p.m. July 18, 2005 (the "Order"), Petitioner's counsel was telephonically advised that the Petitioner was to be removed to a new facility. The petitioner has now been placed in an isolated cell in the so-called "Stockade".

To the extent that the "Stockade" is a proper venue for a prisoner of the Petitioner's high risk status, the Petitioner and his family are relieved. However, the fact of such a speedy determination and action in Florida within hours of the issuance of the Order speaks to the strength of the connection between actions within this circuit and repercussions, good or bad, in distant venues. The fear, of course, is that

the removal to the Stockade merely confirms the Petitioner's role as a pawn in a game much more serious than chess.

Criminal Proceedings in Florida

The Petitioner was arraigned on July 18, 2005, in Florida and his trial for murder in the first degree is scheduled for October 31, 2005. The Petitioner objected to the entry of a plea in the Florida court in part because of a violation of his administrative right to oppose temporary custody. The state prosecutor represented that the Petitioner had not timely filed his Request For Administrative Remedy within the relevant thirty (30) day period. Exhibit D is the notice delivered to Petitioner on June 7, 2005 (to which the Petitioner refused to attach his signature) and Exhibit E-1 was dated July 5, 2005 and submitted to the Petitioner's counselor on July 6, 2005. In addition, the BOR received notice in any and all events once again on July 7, 2005 on its form BP-S567.051 – the petitioner's 'Acknowledgement'--- a form prepared and dated by the BOP (Exhibit E-2). The State Attorney stated at the arraignment that there would be one hundred (100) witnesses for the prosecution. The Petitioner's court appointed defense counsel is a single practitioner with several concurrent assignments and he does not have access to the resources of the office of the public defender. Notwithstanding the reasonable anticipation that the prosecution will ultimately pare an unwieldy and cumbersome list of witnesses, it will do so only after having once again sapped the limited energy and resources of the petitioner.

The Local Prosecutors have been developing material for more than ten (10) years and now impose a burden upon a sole practitioner in Florida to study, analyze, appreciate and cull through an avalanche of material concerning events which did not occur in Florida. The ability of counsel to cope with such a prodigious assignment would be enhanced if Petitioner's Boston pro bono counsel were not being continually diverted from efforts regarding a new trail, a 2255, a series of civil proceedings and matters of the Petitioner's safety and availability to prepare for his various proceedings.

To coerce the Petitioner and new counsel to answer to a murder charge under the prevailing circumstances is to admit that effective assistance of counsel is but a noble sentiment but not a reality when the government chooses to assert its power without regard to common sense, common dignity and common law.

B.) On July 3, 2005, the Petitioner's counsel forwarded a letter to Barbara G. Pineiro, Assistant State Attorney for the State of Florida, regarding a myriad of concerns with the matter of *State of Florida v. John J. Connolly, Jr.*, Eleventh Judicial Circuit No. F01-8287D, attached hereto as **Exhibit J**. The request specifically asked that "(i)n order that we continue to represent to the Federal Court all the pertinent facts and information that is accurate...(for) the exact date in November, 2004, that the...(I)ndictment actually sought and returned by the grand jury". There was no response to this particular request. However, a letter dated July 11, 2005 and received by the Petitioner's counsel after

the filing of the petition, was signed by Michael Von Zamft, ASA, and copied to "Fred Wyshak, AUSA" and to ASA Pineiro (**Exhibit K**). The 'federal' nature of the de jure state proceeding is highlighted by the fact that a letter to a state prosecutor in Florida is answered with a copy to the Local Prosecutors in Boston. It is also a matter of note that the response from the State Attorney makes no reference to the details of the Petitioner's incarceration or counsel's inquiry with respect to dates. It is respectfully submitted that this is a clear indication that no changes were then anticipated and none were to be made until after the issuance of the Order.

C.) Count II of the Indictment alleges a conspiracy to commit murder that occurred over the extended period of August 1, 1976 through October 2, 1982 and the State Attorney, Michael Von Zamft, stated that there will be more than one hundred (100) witnesses for the prosecution. This reveals the continuing strategy of the Local Prosecutors to propose an avalanche of evidence which cannot timely be analyzed and appreciated by newly appointed defense counsel in Florida prior to an October 1 deadline. The Local prosecutors have been developing this avalanche for more than ten (10) years. The capacity of Petitioner's pro bono counsel in Boston to provide truly effective assistance in this regard to the Petitioner and his court appointed counsel in Florida has been extremely limited because of the multiplicity of federal actions for the same acts---which actions are in conflict with "the so-called Petite policy based on Petite v. United States, 361 U.S. 529". Rinaldi v. United States, 434 U.S. 22 (1977). It is not illogical to posit that Local Prosecutors shopped for a state forum in order to

avoid compliance with this policy---or mandate---and to otherwise shield their actions from review by the Office of the Attorney General of the United States and/or this circuit.

It must be emphasized that counsel for the Petitioner, serving pro bono, have been seriously and continually diverted from their efforts to advance the Petitioner's substantive interests because of the demands imposed by the multiplicity of federal actions and activities. There have been dramatic impositions upon their capacity to be of assistance. For example, since July 1, 2005, there has been an expenditure of almost, if not more than, two hundred (200) hours of time to identify and pursue matters to ensure the Petitioner's safety. These efforts include filing an emergency motion with the district court, a direct appeal to the Attorney General for intercession, the petition for mandamus, monitoring to the extent possible the placements of the Petitioner, an appeal to the Regional Director of the Bureau of Prisons and trying to orient the Petitioner's newly appointed counsel in Florida.. The cause of otherwise obtaining a judicial setting in which matters of imminence and substance can be fairly and completely addressed and resolved has been sacrificed and delayed because of the concert of federal activities in Boston, North Carolina and Florida. This does more than merely tend to advance what the Petitioner characterizes as the prosecutors' goals of inundating him and his counsel and diverting, delaying and deflecting activities in the district court of Massachusetts.

JOHN J. CONNOLLY, JR.
By his attorneys,

Edward J. Lonergan, Esquire
BBO #303960
101 Merrimac Street (Suite 800)
Boston, MA 02114-9601
617-371-0430
617-227-7177 fax

E. Peter Mullane, Esquire
BBO #360000
MULLANE, MICHEL &
McINNES
132 Mount Auburn Street
Cambridge, MA 02138-5736
617- 661-9000
617- 661-2915 fax

Dated: July 21, 2005

United States Court of Appeals
For the First Circuit

No. 05-2067

IN RE: JOHN J. CONNOLLY, JR.,
Petitioner,

Before

Boudin, Chief Judge,
Selya and Howard, Circuit Judges.

JUDGEMENT

Entered: September 7, 2005

Petitioner's request for a writ of mandamus is denied.

By the Court:
Richard Cushing Donovan, Clerk

By:_____
Chief Deputy Clerk

[cc: E. Peter Mullane, Esq., Edward J. Lonergan, William Nardini, AUSA, John Durham, AUSA, Leonard Boyle, Esq., Jonathan Albano, Esq. M. Robert Dushman, Esq.]